

NO. 22051

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRANCE I. POSTON, a citizen )  
of Alaska, )

Appellant, )

vs. )

THE UNITED STATES OF AMERICA, )  
et al., )

Appellees. )

ON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE DISTRICT  
OF HAWAII IN CIVIL  
No. 2345

FILED

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ANSWERING BRIEF OF  
DEFENDANT-APPELLEE HAWAIIAN  
ELECTRIC COMPANY, INC.

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Electric Company, Inc.

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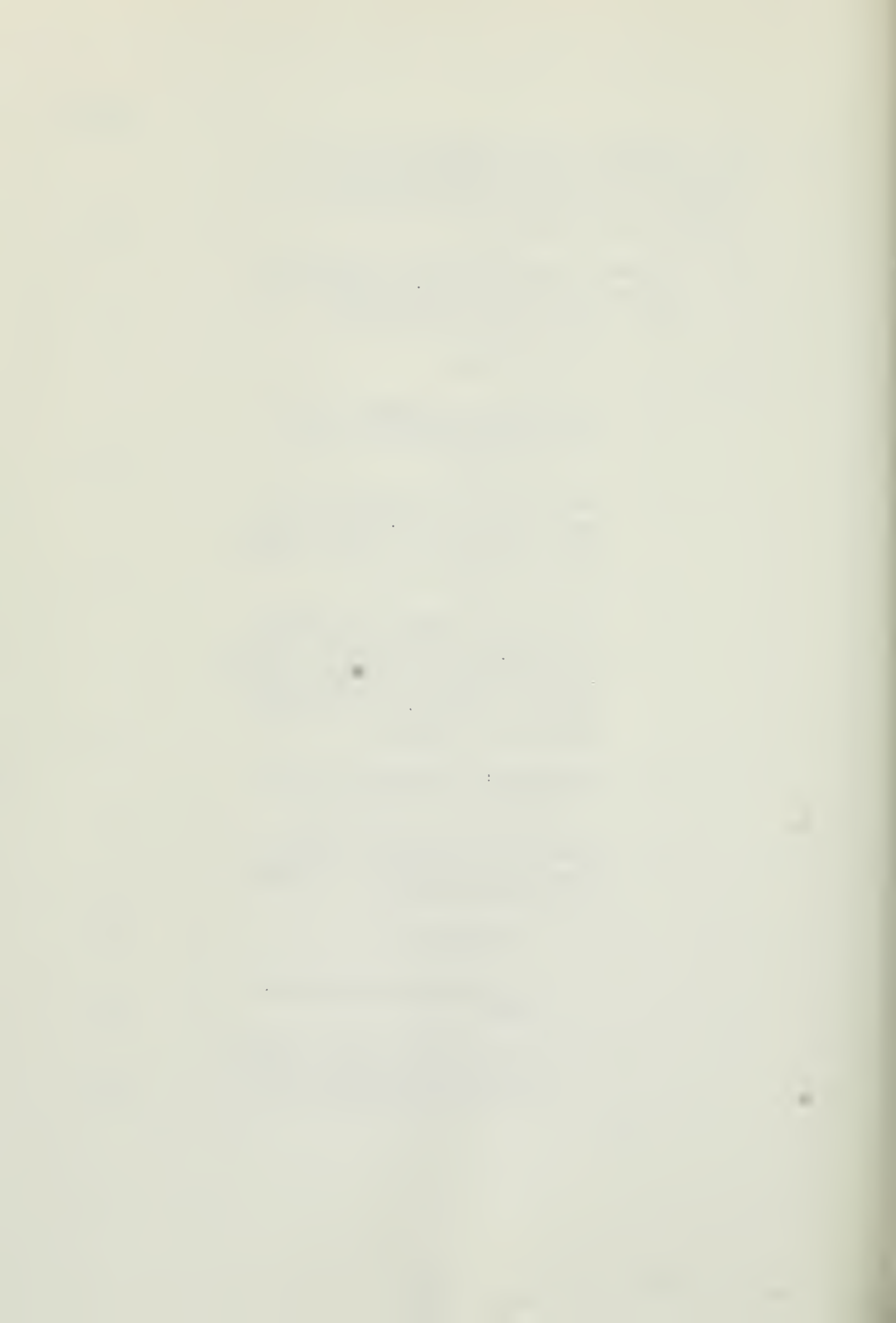
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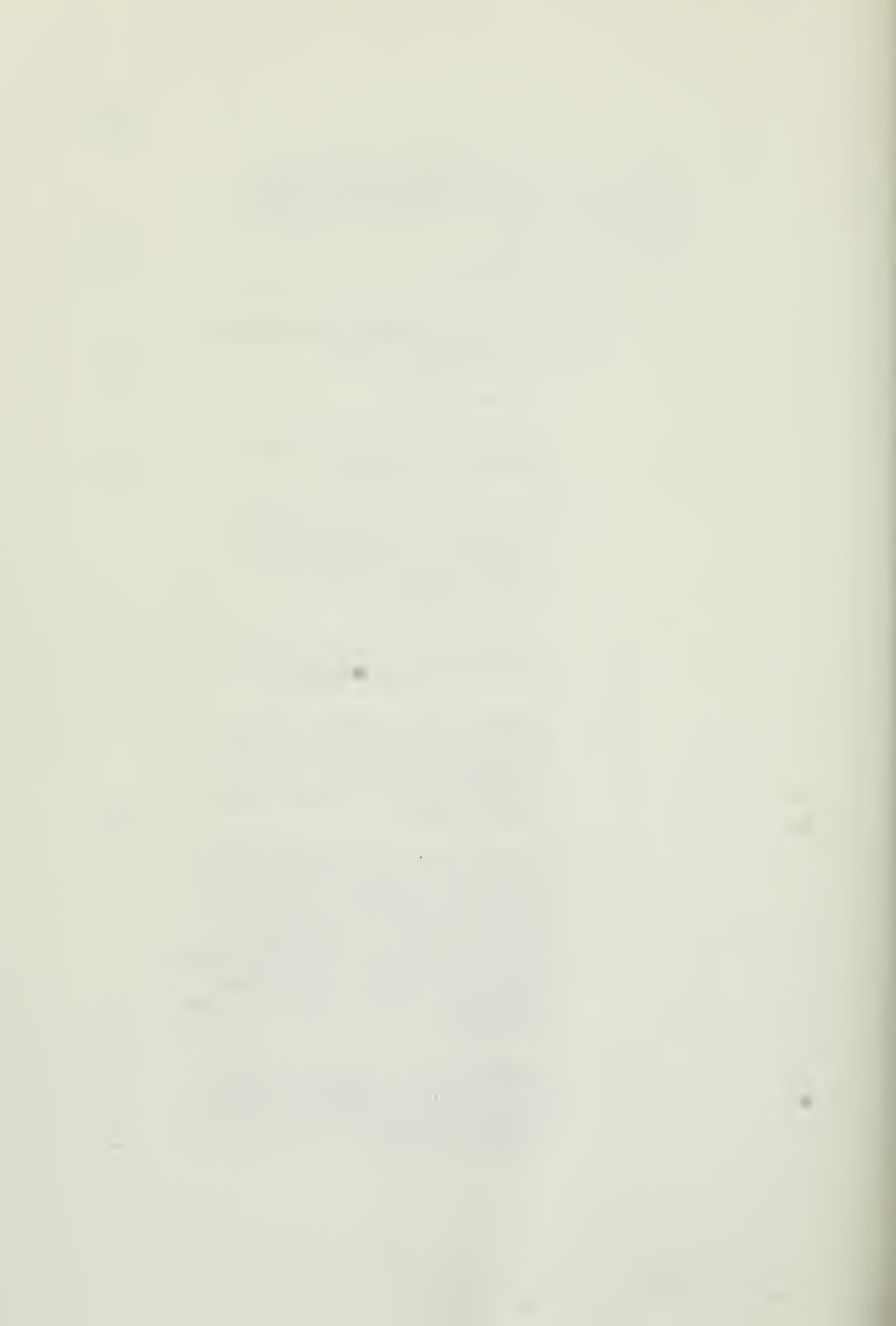
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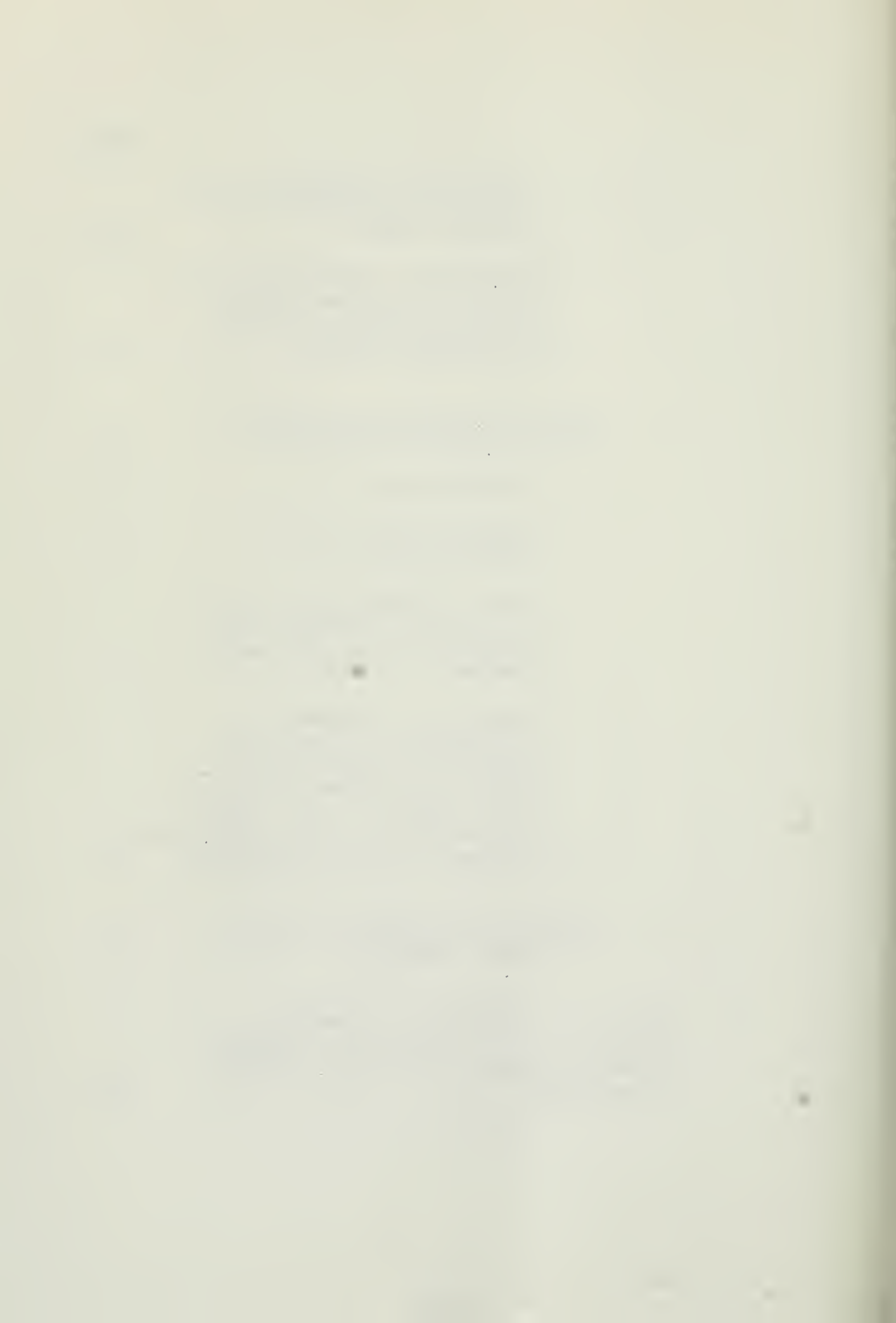
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DEFENDANT-APPELLEE HAWAIIAN  
ELECTRIC COMPANY, INC.

JURISDICTIONAL STATEMENT

Defendant-appellee Hawaiian Electric Company,  
Inc., hereinafter called "Hawaiian Electric", agrees  
with plaintiff-appellant's jurisdictional statement.

STATEMENT OF THE CASE

A. The Nature of the Case

This is an action for damages for personal  
injuries sustained by plaintiff on September 10, 1964,

# THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

AND

JOHN HALL

OF

THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

THE SECOND VOLUME

PRINTED BY

JOHN BURNET, AT THE SIGN OF THE

WINDMILL, IN ST. MARTIN'S LANE, NEAR CHURCH LANE

AND BY

JOHN HALL

OF

THE UNIVERSITY OF OXFORD

AND BY

at the Kunia facility owned and operated by the United States on Oahu, Hawaii.

B. The Scene of the Accident

The portion of the Kunia facility where the accident occurred is portrayed in an enlarged photograph which was admitted in evidence as exhibit G-7A (Tr. 331).

Exhibit G-7A shows that at this portion of the Kunia facility there were two utility poles upon which certain electrical equipment was mounted and that one of said utility poles was enclosed in a chain-link fence. Exhibit G-7A also shows two guy wires running from the tops of the poles down to the ground to the left of the poles as shown in the photograph.

All parties admitted in the pretrial order that the United States was the sole owner, occupier and user of the Kunia facility (R. 46).

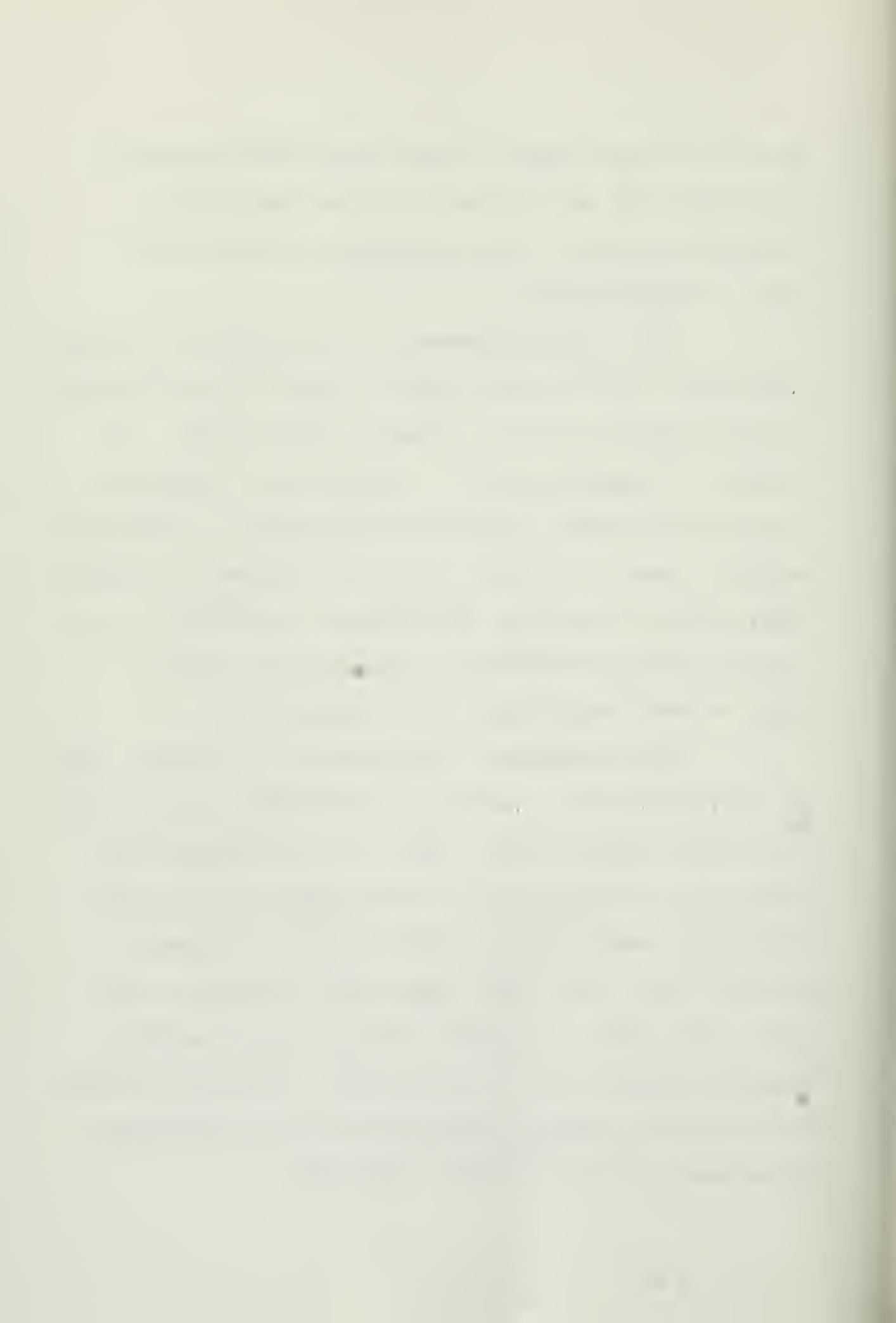
It was also admitted in the pretrial order that Hawaiian Electric was the owner of a metering transformer, certain meters and certain conductors running between the transformer and the meters, all



located at Kunia near the place where the plaintiff was injured and was the owner of the power lines transmitting power to the air switch on top of the poles at Kunia (R. 48).

The testimony makes it clear that the metering transformer and the meters and the power lines mentioned in the pretrial order are shown in exhibit G-7A. Mr. Zeigler, a Hawaiian Electric Company vice president, testified at length concerning that portion of the Kunia facility shown in exhibit G-7A and explained its design, construction, ownership, maintenance and control. His testimony was uncontradicted and, therefore, may be taken to have established the following facts.

The transformer shown mounted on the two poles in exhibit G-7A was a metering transformer and was owned by Hawaiian Electric (Tr. 1242). The rectangular box mounted five or six feet off the ground on one of the poles was a meter box and also belonged to Hawaiian Electric (Tr. 1243). The three wires coming into the upper left corner of exhibit G-7A were also owned by Hawaiian Electric (Tr. 443 and 1243). Hawaiian Electric also owned the conduit running down from the metering transformer to the meter (Tr. 442-443).



The Hawaiian Electric wires coming into the photograph from the upper left-hand side of exhibit G-7A terminated where the wires were attached to the insulators at the top of the poles and Hawaiian Electric did not own the wires on the other side of the insulators and did not own the wires coming down to the metering transformer (Tr. 443).

Hawaiian Electric did not design or construct the facility shown in exhibit G-7A (Tr. 1242), and all that Hawaiian Electric did was to put the meters and the metering transformer in place and connect the government's wires which were already in place to the insulators on top of the metering transformer (Tr. 444) and install the conduit between the metering transformer and the meters.

The point of delivery where Hawaiian Electric delivered current to the United States was the point where Hawaiian Electric's wires ended at the insulators on top of the poles (Tr. 446).

There was introduced into evidence the printed Rules and Rate Schedules Applicable to Electric Service which constituted order number 1086 of the Hawaii Public



Utilities Commission (Ex. H-1, Tr. 587). Paragraph F of rule 14 of these rules has long provided that Hawaiian Electric's customers shall install and maintain all wires and equipment required for receiving electric energy from the lines of Hawaiian Electric and that the customer shall be solely responsible for the transmission of electric energy through the customer's wires.<sup>1/</sup>

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<sup>1/</sup> Paragraph F of rule 14 of exhibit H-1 reads as follows:

"F. CUSTOMER RESPONSIBILITY FOR HIS EQUIPMENT

"The customer shall, at his own sole risk and expense, furnish, install, inspect and keep in good and safe condition all electrical wires, lines, machinery, apparatus and equipment of any kind or character which may be required for: (1) receiving electric energy from the lines of the Company, regardless of the location of the transformers, meters or other equipment of the Company; and (2) applying and utilizing such energy, including all necessary protective equipment and suitable housing therefor.

"The customer shall also transmit and deliver and be solely responsible for the transmission and delivery of all electric energy over or through the customer's wires and equipment, regardless of the place where such electric energy may be transformed or metered.

"The Company will not be responsible for any loss or damage occasioned or caused by the negligence, want of proper care or wrongful act of the customer, his agents, employees or licensees in installing lines, machinery, apparatus or equipment."



Mr. Zeigler testified that the facility depicted in exhibit G-7A was what the United States was required to furnish in accordance with paragraph F of rule 14 (Tr. 1248-1249).

Mr. Zeigler also testified that Hawaiian Electric had no control over the current on the customer's premises (Tr. 1252) and that the air switch which was located at the top of the poles shown in exhibit G-7A was owned by the United States and that Hawaiian Electric had no authority to manipulate it (Tr. 1252-1253).

Mr. Zeigler also testified that Hawaiian Electric did not maintain the installation shown in exhibit G-7A although Hawaiian Electric did read its meters and would replace a meter if one were damaged (Tr. 1253).

Exhibit G-7A shows in the background a chain-link fence which was a part of the fence surrounding the entire Kunia facility. The photograph also shows that there was another fence enclosing the base of the pole on the left side of the photograph on which the meter box was mounted. Mr. Zeigler testified that Hawaiian Electric gained access to the meter box by coming through a gate in the outside fence into the



enclosed area around the base of the pole on which the meter box was mounted, but that the Navy still maintained control of that area (Tr. 1255-1256).

Mr. Zeigler also testified that Hawaiian Electric did not have the right to modify the poles or the guy wires shown in exhibit G-7A in any way and that it did not have the right to control any of the work that the United States did at the facility (Tr. 1256-1257).

By way of summary, the foregoing testimony and documentary evidence make it clear that Hawaiian Electric did not own, design, construct or maintain the Kunia facility shown in exhibit G-7A and that the only equipment it owned there consisted of the three wires that entered exhibit G-7A at the upper left-hand corner and terminated at the insulators at the top of the poles and the metering transformer and the meters located in the rectangular box near the bottom of one of the poles and the conduit running between the metering transformer and the meter box. It is also clear that Hawaiian Electric delivered electric current to the United States at the insulators at the top of the poles and thereafter had no further control over the



current as it passed through the wires of the United States.

C. The Accident

The accident occurred when plaintiff was in contact with the further away of the two guy wires shown in exhibit G-7A.

Plaintiff testified that he was in the process of removing the lower end of the guy wire from its ground anchor but that he had not completely removed it when "everything gave way. That was it. I saw this flash, and that's it." (Tr. 203).

Thus, it appears to be plaintiff's claim that the guy wire had not been removed from its ground anchor when the accident occurred. However, government witnesses Ponte, Landry and Emsley all testified that they arrived at the scene shortly after the accident and found the guy wire completely detached from the anchor and hanging over the corner of the fence in the position shown in exhibit G-5 at a point about 15 feet from the anchor to which the guy wire had been attached (Tr. 1096, 1106-1107, 1029, 1032-1033 and 1069-1071). Witnesses Emsley and Landry also testified



as to seeing a burn mark on the guy wire just below the insulator shown in exhibit G-7A and a corresponding burn mark on one of the wires coming down from the main power line to one of the insulators on top of the metering transformer (Tr. 1036-1038 and 1074). These two witnesses also testified that there were burn marks on the fence where the guy wire was found hanging as shown in exhibit G-5 and also on the ground at the base of the fence (Tr. 1036-1038 and 1074).

An examination of exhibit G-7A indicates that it would be physically impossible for the guy wire involved in this accident to come into contact with any electric wire shown in the photograph unless it were detached from its ground anchor. Plaintiff offered no evidence to the contrary.

D. Plaintiff's Theory as to Hawaiian Electric

Prior to trial plaintiff had abandoned any contention that the facility shown in exhibit G-7A had been defectively constructed and had abandoned any reliance upon the doctrine of res ipsa loquitor.

As to Hawaiian Electric, plaintiff's theory, as set forth in the pretrial order, was as follows:



"Hawaiian Electric Company, Inc. built and owned a portion of the electrical installation to which the guy wire was attached. It owned and controlled the flow of high-voltage current within the installation. It exclusively maintained the electrical installation. It had a rent-free lease of the land upon which the installation was built. Due to the aforesaid, it had a duty to erect signs or otherwise warn of the presence of the dangerous instrumentality. Hawaiian Electric Company, Inc. did not give such warning. The failure to do so was a proximate cause of the injuries sustained by plaintiff." (R.41).

E. The Court's Disposition of the Claim against Hawaiian Electric

At the conclusion of all of the evidence, Hawaiian Electric moved for a directed verdict, and this motion was granted, and by an order filed January 25, 1967, the court ordered that a verdict should be entered for Hawaiian Electric on the ground that



plaintiff had failed to adduce any substantial evidence of any negligence on the part of Hawaiian Electric and on the ground that plaintiff was guilty of contributory negligence as a matter of law.

#### QUESTIONS PRESENTED ON APPEAL

The primary question on appeal so far as Hawaiian Electric is concerned is whether the trial court erred in granting a directed verdict in its favor and this will depend upon whether plaintiff adduced any evidence that created any issues that should have been submitted to the jury.

It will also be necessary to consider the following questions raised by the plaintiff in his opening brief:

- (a) Whether the reasoning followed by the trial court in reaching its decision to grant a directed verdict in favor of Hawaiian Electric is grounds for reversal.
- (b) Whether plaintiff has pointed to any evidence which created issues that should have been submitted to the jury.



- (c) Whether the court erred by considering plaintiff's lack of status as Hawaiian Electric's invitee in concluding that a verdict should be directed for Hawaiian Electric.
- (d) Whether the court erred in concluding that plaintiff was guilty of contributory negligence as a matter of law.
- (e) Whether Hawaiian Electric violated any duty to post.
- (f) Whether the court's handling of the pretrial order was reversible error.
- (g) Whether the court's refusal to admit Y & D blueprint 872808 into evidence was prejudicial error.
- (h) Whether plaintiff had the right to rely upon the doctrine of res ipsa loquitor.
- (i) Whether plaintiff is entitled to a new trial because of the alleged misconduct of counsel.
- (j) Whether plaintiff is entitled to a new trial on account of the court's refusal to admit plaintiff's entire deposition into evidence.
- (k) Whether plaintiff is entitled to a new trial because of the court's mention of the factor of workmen's compensation after the conclusion of the trial.



- (1) Whether plaintiff is entitled to a new trial because of the provisions of the fifth and seventh amendments to the United States Constitution.

### SUMMARY OF ARGUMENT

The judgment below directing a verdict in favor of Hawaiian Electric should be affirmed because all reasonable minds would agree that the evidence did not create any issues as to Hawaiian Electric that should have been submitted to the jury.

The judgment should also be affirmed because there is no merit to any of the plaintiff's arguments advanced in his opening brief. In particular,

- (a) There is no merit to plaintiff's argument that the court departed from all standards by weighing the evidence and usurping the function of the jury.
- (b) There is no merit to plaintiff's argument that the evidence created issues which should have been submitted to the jury.
- (c) There is no merit to plaintiff's claim that the court erred in predicating Hawaiian Electric's duty of care toward plaintiff on his lack of status as Hawaiian Electric's invitee.



- (d) There is no merit to plaintiff's argument that the court's conclusion that plaintiff was guilty of contributory negligence was inconsistent with its finding of no negligence on the part of Hawaiian Electric.
- (e) There is no merit to plaintiff's argument that Hawaiian Electric violated its duty to post.
- (f) There is no merit to plaintiff's arguments pertaining to the court's use of the pretrial order.
- (g) There is no merit to plaintiff's argument in relation to Y & D blueprint 872808.
- (h) There is no merit to plaintiff's argument that he had the right to rely on the doctrine of res ipsa loquitor.
- (i) There is no merit in respect to plaintiff's arguments that he is entitled to a new trial because of the alleged prejudicial conduct of counsel or because of the court's refusal to allow the plaintiff's entire deposition into evidence or because the court mentioned the fact of workmen's compensation after the conclusion of the trial or because of plaintiff's arguments based on the fifth and seventh amendments to the United States Constitution.
- (j) There is no merit to plaintiff's argument that he was entitled to a directed verdict against Hawaiian Electric.



## ARGUMENT

- I. The judgment in favor of Hawaiian Electric should be affirmed because all reasonable minds would agree that the evidence did not create any issues as to Hawaiian Electric that should have been submitted to the jury.
- 

According to the pretrial order plaintiff's theory as to Hawaiian Electric was that Hawaiian Electric built and owned a portion of the electrical installation to which the guy wire was attached, that it owned and controlled the flow of current within the installation, that it exclusively maintained the electrical installation and that it had a rent-free lease of the land upon which the installation was built and that due to the aforesaid it had a duty to warn plaintiff of the presence of the "dangerous instrumentality" (R. 41).

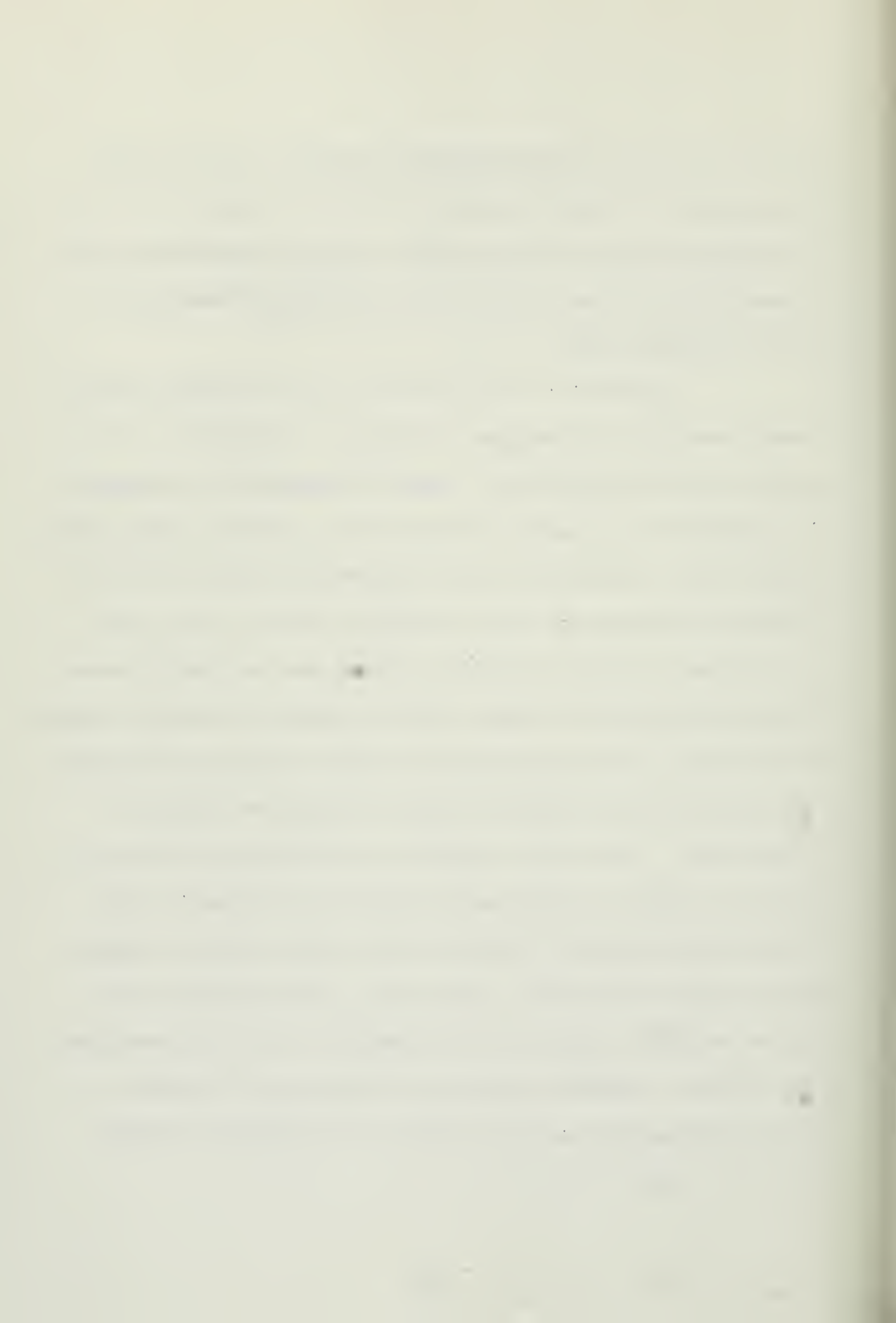
However, not only did plaintiff fail to prove any of these claims but the evidence affirmatively establishes the contrary of what plaintiff asserted.

Plaintiff's first claim was that Hawaiian Electric built and owned a portion of the electrical installation to which the guy wire was attached. However,



the evidence was that Hawaiian Electric did not build any portion of the facility but that it merely put its transformer and meters in place on the installation and connected existing wires to its metering transformer (Tr. 1242 and 444).

Plaintiff's next claim is that Hawaiian Electric owned and controlled the flow of electric current within the installation. Plaintiff adduced no evidence to support this claim, and again the evidence established exactly the contrary of what plaintiff claimed for Mr. Zeigler's uncontradicted testimony was that the point of delivery of the electric current was the point where Hawaiian Electric's wires were attached to the air switch at the top of the two poles and that thereafter Hawaiian Electric had no control of the current (Tr. 446 and 1252-1253). After the current left Hawaiian Electric's wires it could be controlled by the government's air switch but Hawaiian Electric had no authority to manipulate this switch (Tr. 1252-1253). Furthermore, the Rules and Rate Schedules Applicable to Service provided that the customer alone was responsible for the transmission of current through the customer's wires (Ex. H-1, Rule 14, ¶ F ).



Plaintiff's next claim is that Hawaiian Electric "exclusively maintained" the electrical installation. Again plaintiff offered no evidence to prove this claim and the evidence affirmatively proves that Hawaiian Electric did not maintain the facility either exclusively or in conjunction with anyone else (Tr. 1253, Ex. H-1, Rule 14 P. F.).

Plaintiff's last claim is that Hawaiian Electric had a rent-free lease of the land upon which the installation was built. Again there is no evidence to support this claim.

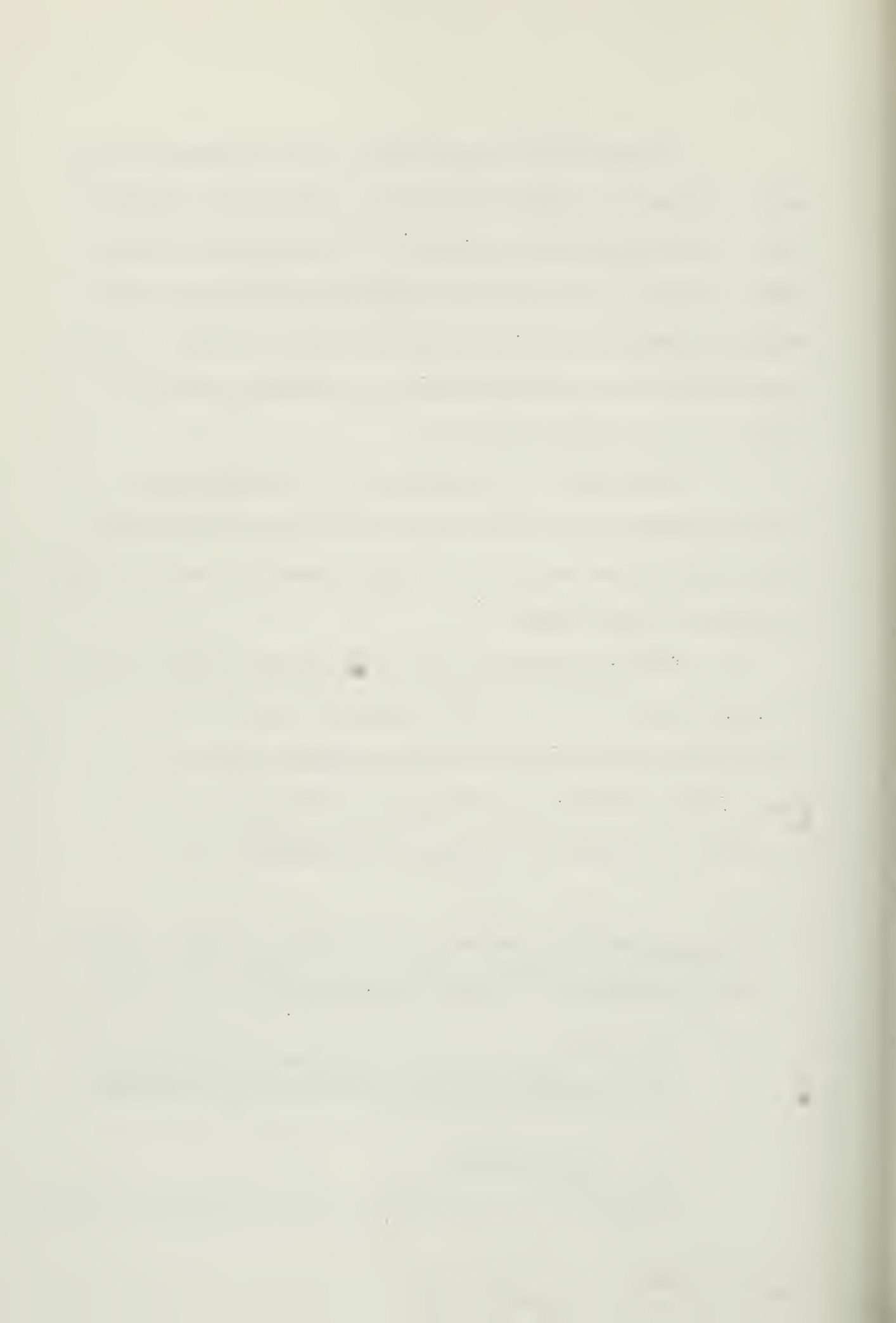
Thus, plaintiff failed to produce any evidence to support any of his claims against Hawaiian Electric, and it is submitted that this complete lack of evidence left the trial court with no alternative but to direct a verdict in Hawaiian Electric's favor.

II. The judgment in favor of Hawaiian Electric should be affirmed because there is no merit to any of the arguments asserted by plaintiff.

A. Answer to plaintiff's argument in respect to the directed verdict for Hawaiian Electric

1. Introduction

Plaintiff's argument as to the directed verdict



for Hawaiian Electric consists of five brief sections appearing on pages 32 through 39 of plaintiff's brief.

Plaintiff's arguments are difficult to follow. Furthermore, plaintiff does not discuss what test should be used to determine whether the directed verdict was properly granted. Finally, plaintiff points to no evidence that created any issues as to Hawaiian Electric as to which reasonable minds could differ.

Plaintiff's arguments will be answered in the order in which they appear in plaintiff's brief.

2. Plaintiff's argument that the court departed from all standards

Plaintiff first sets forth various issues as to Hawaiian Electric as they appeared in the pretrial order and as they were referred to by Judge Pence in an oral decision (O.B. 32 and 33). However, there is no mention in this section of any evidence which would have justified submission of any of these issues to the jury.

Plaintiff next lists several conclusions reached by the court during the course of the argument on Hawaiian Electric's motion for a directed verdict.



However, again there is no mention of any evidence that would lead to the belief that reasonable men would differ as to the validity of these conclusions.

Finally, plaintiff quotes several statements made by the court at the time of granting Hawaiian Electric's motion for a directed verdict, to the effect that the evidence "will sustain a finding" that plaintiff was not Hawaiian Electric's invitee and that if there was any liability on the part of the electric company, the plaintiff was contributorily negligent.

Plaintiff has overlooked the court's order of January 25, 1967, wherein the court ordered that a verdict be entered for Hawaiian Electric on the grounds, first, that the plaintiff had failed to adduce any substantial evidence of any negligence upon the part of Hawaiian Electric which was a proximate cause of plaintiff's injuries and, second, that the evidence established as a matter of law that plaintiff was guilty of contributory negligence which was a proximate cause of his injuries.

If the court was correct that the plaintiff had failed to adduce any substantial evidence of Hawaiian



Electric's negligence or that plaintiff was guilty of contributory negligence as a matter of law, then the judgment in favor of Hawaiian Electric must be sustained, and the particular reasoning used by the court in its oral decision granting the motion is irrelevant.

Plaintiff does not discuss what tests should be applied in determining whether the trial court was correct in granting the directed verdict for Hawaiian Electric.

These tests are set forth in 5 Moore, Federal Practice ¶ 50.02 at 2317 (2d ed. 1966), where it is stated that a directed verdict is normally used, first, where there is complete absence of pleading or proof on an issue or issues material to the cause of action and, second, where there are no controverted issues of fact upon which reasonable men could differ. Moore goes on to state on page 2320 that, "a verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion."



Thus, the issue here is not whether the trial court followed the proper path in coming to the conclusion that the directed verdict should be granted, but whether there was either a complete lack of evidence to create any issues to submit to the jury in respect to the claim against Hawaiian Electric or whether the evidence viewed most favorably for the plaintiff created any issues as to which reasonable minds might differ. As shown in section I of this argument there was a complete lack of evidence supporting any of the plaintiff's claims against Hawaiian Electric as outlined in plaintiff's theory in the pretrial order.

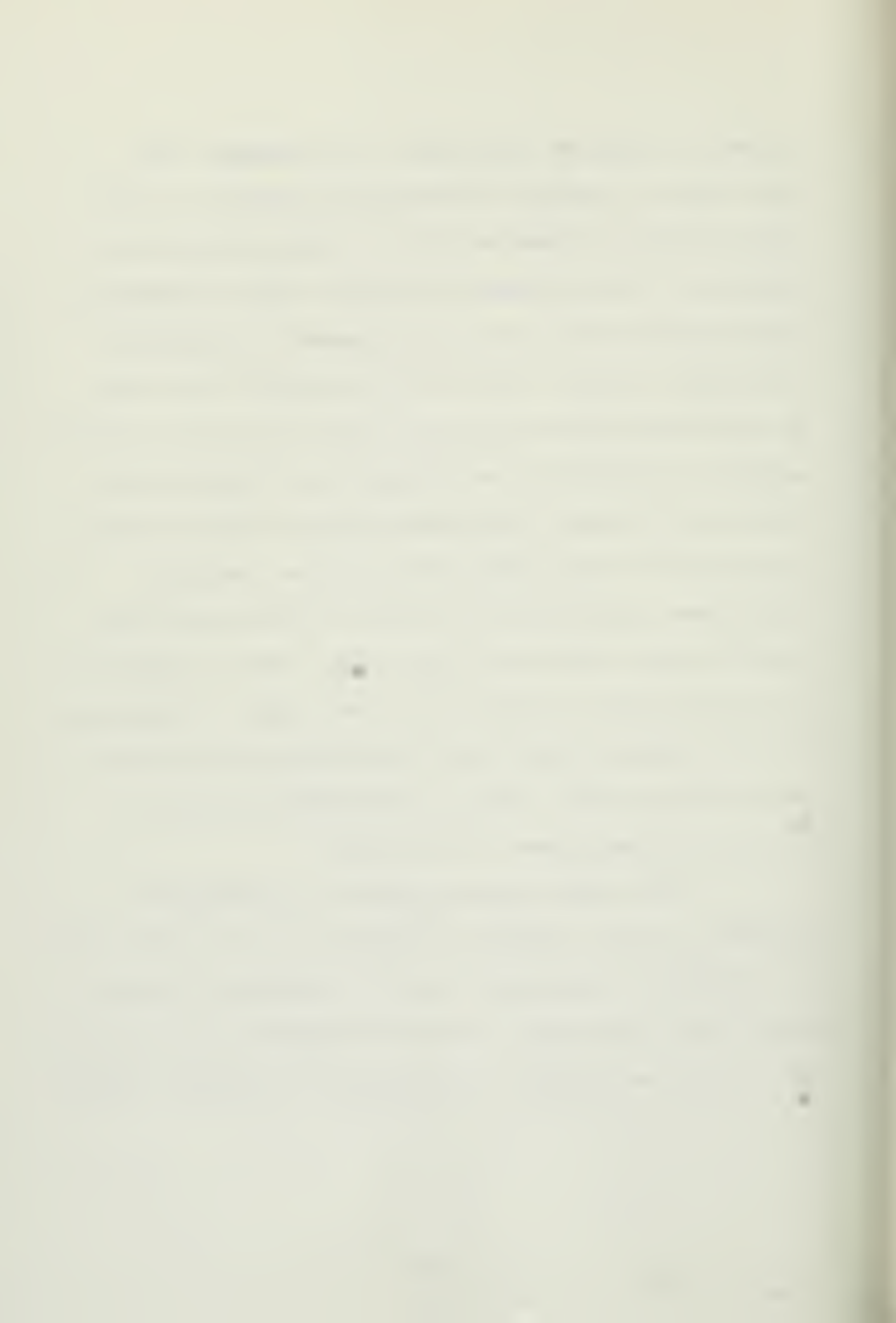
3. Plaintiff's argument that the evidence created issues that should have been determined by the jury.

If, in fact, the evidence did create issues as to Hawaiian Electric, then the claim against Hawaiian Electric should have been submitted to the jury. However, plaintiff does not point to any such evidence. Instead, plaintiff merely refers to claims made by plaintiff's attorney during the course of oral argument on plaintiff's motion for judgment notwithstanding the verdicts without pointing to any testimony or documentary



evidence to support the claims. For example, the first item of supposed "substantial evidence" is the bare statement, "Hawaiian Electric did not warn the plaintiff of the presence of 46,000 volts of electricity present at his place of employment", followed by a reference to page 1414 of the transcript (O.B. 34). On referring to page 1414 one finds that it is a transcript of plaintiff's oral argument in support of his motion for judgment notwithstanding the verdict which was heard five days after the trial had concluded. Furthermore, plaintiff's attorney did not during the course of this argument at page 1414 refer to evidence, but merely makes the bald assertion, "Now, the Hawaiian Electric Company didn't warn the plaintiff of the presence of the 46,000 volts of electricity present at his place of employment" (Tr. 1414).

The second supposed item of "substantial evidence" is the statement, "46,000 volts of electricity is a dangerous instrument", with a reference to page 1415 of the transcript. When one examines the transcript it is seen that, again, the plaintiff has merely repeated



a bare assertion of fact made during the course of argument on a motion following the trial.

The third supposed item of "substantial evidence" is the statement, "that Hawaiian Electric was negligent in failing to fulfill its duty of care commensurate with the dangerous instrumentality (Tr. 1416), toward a person lawfully upon the premises (Tr. 1418)." Again plaintiff has merely referred to assertions made during the course of oral argument, but this time not only has he failed to point to any evidence, but he has merely repeated an earlier assertion that he made as to an ultimate fact without giving the slightest hint as to the whereabouts of the evidence as to the supposed negligence, or as to the basis of the supposed duty of care.

Plaintiff's final supposed item of "substantial evidence" is the statement, "The absence of warning signs lured the plaintiff into a feeling of safety (Tr. 1423-1424) which was, in effect, a trap (Tr. 1428-1429)." Again, plaintiff is merely repeating assertions made during the course of oral argument on his motion following the trial.



It can be assumed that there was evidence from which the jury could infer that Hawaiian Electric did not warn the plaintiff of the presence of 46,000 volts of electricity at the government's Kunia facility, and it also can be assumed, with or without evidence, that 46,000 volts of electricity is dangerous if one comes into contact with it. However, plaintiff has utterly failed to point to any evidence from which it could be inferred that Hawaiian Electric was negligent "in failing to fulfill its duty of care commensurate with the dangerous instrumentality." What duty is the plaintiff talking about, and what does the plaintiff claim Hawaiian Electric failed to do to fulfill that duty? Plaintiff does not say.

Furthermore, even if it be assumed that the absence of warning signs "lured the plaintiff into a feeling of safety which was in effect a trap", there is no evidence whatsoever from which it can be inferred that the absence of warning signs was in any way attributable to Hawaiian Electric or that Hawaiian Electric had any power or duty to provide warning signs.

It is submitted that plaintiff has failed to point to any evidence whatsoever creating any issue

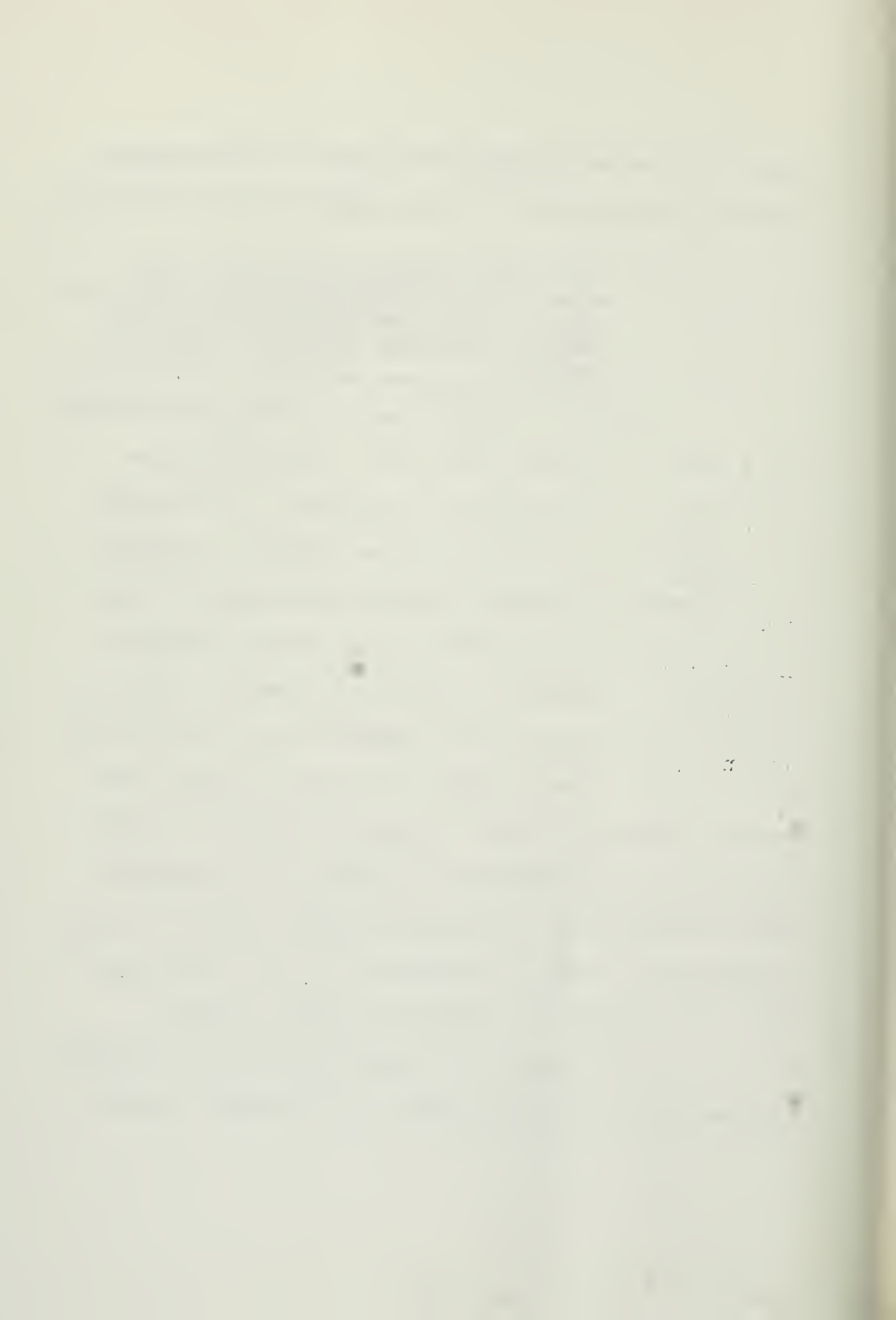


which would have justified the court in submitting to the jury the plaintiff's claim against Hawaiian Electric.

4. Plaintiff's argument that the court erred in predicating Hawaiian Electric's duty of care toward plaintiff on his lack of status as Hawaiian Electric's invitee
- 

It is, of course, true that Hawaiian Electric has a duty to use due care in the installation and maintenance of its electrical equipment, even though such equipment is situated on the property of others, and if Hawaiian Electric breached this duty, it could be held liable for injuries to any person who might reasonably be expected to be on the premises. However, plaintiff does not give the slightest hint of the existence of any evidence which in any way suggests that Hawaiian Electric failed to exercise due care in the installation or maintenance of any of its equipment that was located at the Kunia facility, and it is submitted that a thorough examination of the record in this case will fail to reveal any such evidence.

It is true that during the course of argument on Hawaiian Electric's motion for a directed verdict



the court stated that plaintiff was not Hawaiian Electric's invitee. This fact is indisputable. Plaintiff was on property that was owned, occupied and controlled by the United States, and he was there because he was performing work for the United States pursuant to a contract between the United States and plaintiff's employer. There is no evidence whatsoever that anything that plaintiff was doing was of any interest or benefit to Hawaiian Electric or in any way related to any of Hawaiian Electric's equipment.

It is also clear from the evidence that the facility where plaintiff was injured was completely safe and harmless until plaintiff detached from its ground anchor a guy wire belonging to the United States and somehow brought it into contact with a wire that also belonged to the United States and that was energized by electrical current also belonging to the United States. Under these circumstances the trial court was correct in holding that since plaintiff was not Hawaiian Electric's invitee, Hawaiian Electric did not have a duty to make the government's premises safe for plaintiff to detach the guy wire or to see that



plaintiff performed his work in a manner so that he would not be injured. In this the court is supported by the cases.

In Leslie v. City of Monterey, 34 P.2d 837, the City of Monterey hired a contractor to build a fence around its baseball park. A part of the fence was to be built beneath a 22,000 volt line of Pacific Gas & Electric Company which had a franchise to maintain its line there. During the construction of the fence a pipe came into contact with PG&E's line and plaintiff, who was an employee of the contractor building the fence, was injured. A verdict was rendered against PG&E, and on appeal it was held that a nonsuit should have been granted because plaintiff was not PG&E's invitee.

"[4] It appeared from the evidence that the appellant Pacific Gas and Electric Company, a corporation, owned a franchise, and under such franchise was permitted to maintain its wires at the time and place mentioned in the pleadings, and that as such owner and possessor of such franchise owed no duty to a trespasser or licensee save and except it must refrain from such acts or conduct as might result in a wilful or wanton injury to a trespasser or



licensee. On the other hand, the property owner or owners of the franchise owe to an invitee the duty to keep the premises in a safe condition. Consequently it becomes important to determine from the facts which were developed by the evidence, whether it can be said that a jury could have properly found that plaintiff was an invitee.

"[5] We think it must be conceded that, as to the appellants, plaintiff had not been expressly or impliedly invited to enter upon their property. There is no evidence which in the slightest degree indicates that there was an express invitation, nor is there any evidence that there was an implied invitation. The plaintiff was employed by a contractor and not by the appellants. The work upon which he was engaged cannot fairly be said to have been beneficial to the appellants herein, or to have been done at their request. It was beneficial only to the city of Monterey and to the contractor who performed the work. The appellants were not at all interested in the construction of the said fence and backstop, nor was there any contractual relation between the appellants and plaintiff, or plaintiff's employer. We think, therefore, the evidence clearly indicates that the work on which plaintiff Leslie was engaged at the time the injury occurred, bore no relation to the business of the appellants, nor were they interested therein. Aguilar v. Riverdale C. C. Ass'n, 104 Cal. App. 263, 285 P. 889; Hall v. Southern California Edison Co., supra.



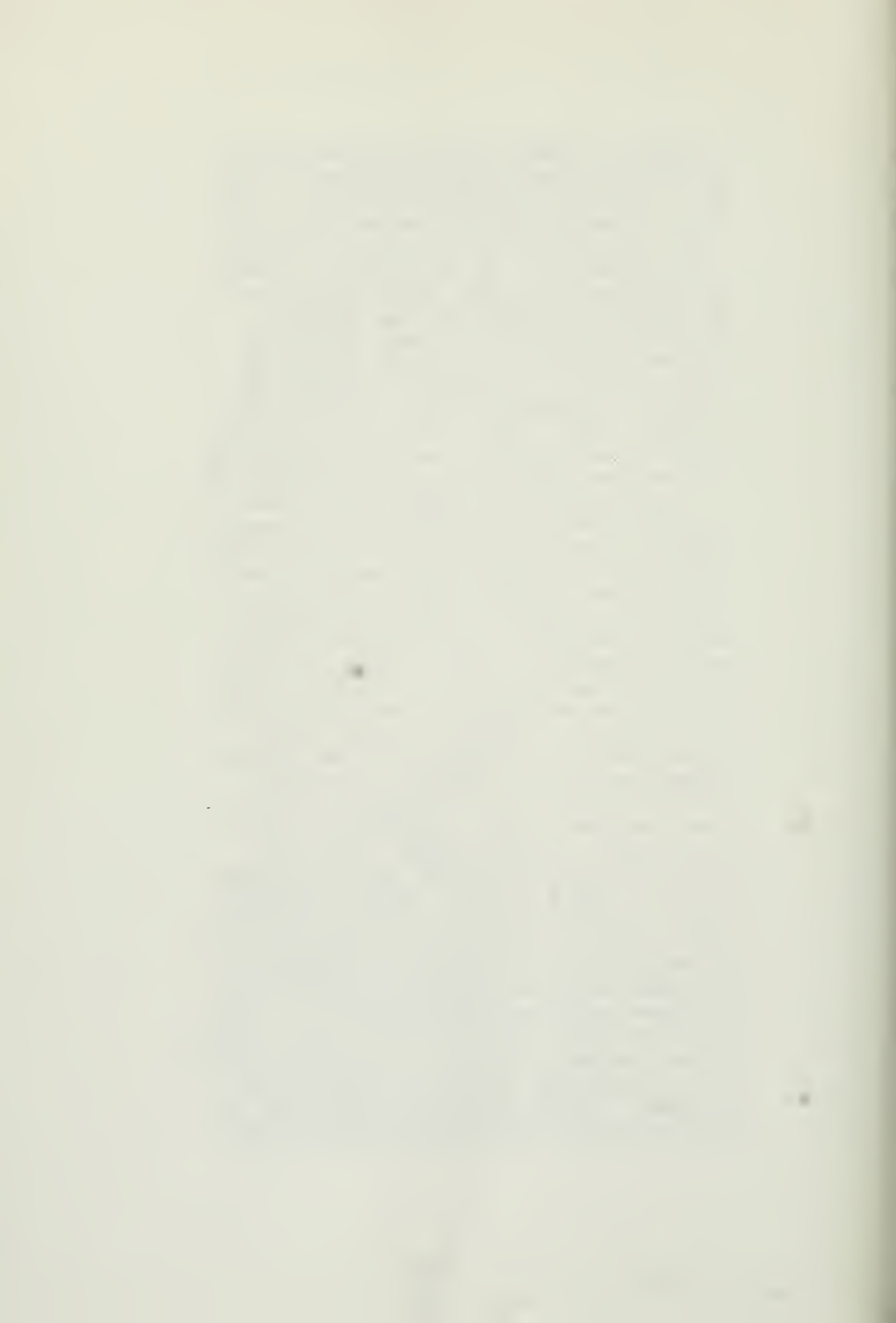
"Under the authority of the case of Hall v. Southern California Edison Co., supra, it follows that the trial court erred in denying appellant's motion for nonsuit."

In Hall v. Southern California Edison Co., 30 P.2d 1013, the Southern California Edison Company transmitted electricity to a pumphouse on land belonging to the Littles by means of its wires running across the Little property and which were fastened to a pole that had been erected by the Edison Company on the Little property. The Littles decided to move their pumphouse and hired an electrical contractor to disconnect the wires from the pumphouse. Plaintiff was an employee of the electrical contractor and was sent to do this work. He climbed the aforesaid pole and cut the wires whereupon the pole fell down and plaintiff was injured. Although plaintiff was clearly an invitee of the Littles, it was held that he was not an invitee of the Edison Company so that the nonsuit as to the Edison Company was correct:

"We think that it must be conceded that, as to the Southern California Edison Company, appellant had not been expressly invited to enter upon their



property. There is no evidence which in the slightest degree indicates that there was an express invitation. However, it must also be conceded that it is not essential that there was an express invitation by the Edison Company to appellant in order that it may be said that appellant was an invitee. It is sufficient if it may fairly be declared that the evidence discloses that there was an implied invitation. *Aguilar v. Riverdale C. C. Ass'n*, 104 Cal. App. 263, 285 P. 889. The existence of an implied invitation depends, in the final analysis, on the nature of the business which brought appellant upon the premises of the Edison Company. Appellant contends that his purpose in ascending the pole, which was the property of the Edison Company, was one which was of mutual benefit to himself and the company. It is argued that it was of benefit to him because he would receive remuneration for doing the work in which he was engaged and of benefit to the Edison Company because by the accomplishment of this work the Edison Company would be enabled to continue the sale of electric energy to a satisfied customer. The contention is ingenious but not impelling. The work upon which appellant was engaged cannot fairly be said to have been beneficial to the Edison Company. It was beneficial to the Littles because they desired to change the location of the pump and they had procured appellant to perform the work which was necessary to be done to effect this change of location. The Edison Company was not at all interested in the proposed change of location of the pump. There was no contractual relation between the Edison Company and



appellant or appellant's employer. We think, therefore, that the evidence clearly indicated that appellant entered upon the property of the Edison Company for purposes of his own and of the Littles and that the work in which appellant was engaged at the time the injury occurred bore no relation to the business of the Edison Company, owner of the pole. Aguilar v. Riverdale C. C. Ass'n, supra. It follows that the trial court's action in granting the nonsuit as to respondent Southern California Edison Company was correct and must be sustained."

In Hayden v. Paramount Productions, 91 P.2d 231, Paramount owned property on and over which defendant City of Los Angeles Department of Water and Power had a right of way to maintain poles, wires and fixtures for carrying 33,000 volt current. Paramount employed a contractor to build a building on the property. The contractor subcontracted the steel work to Bethlehem Steel Company. Plaintiff was a Bethlehem employee who was injured when another Bethlehem employee brought a steel column into contact with one of the City's power lines. Plaintiff brought suit against the City and others. Although the City was in a sense using Paramount's land in maintaining its poles thereon, a nonsuit in favor of the City was



affirmed, in part, on the ground that plaintiff "was not an invitee of the City. . . ."

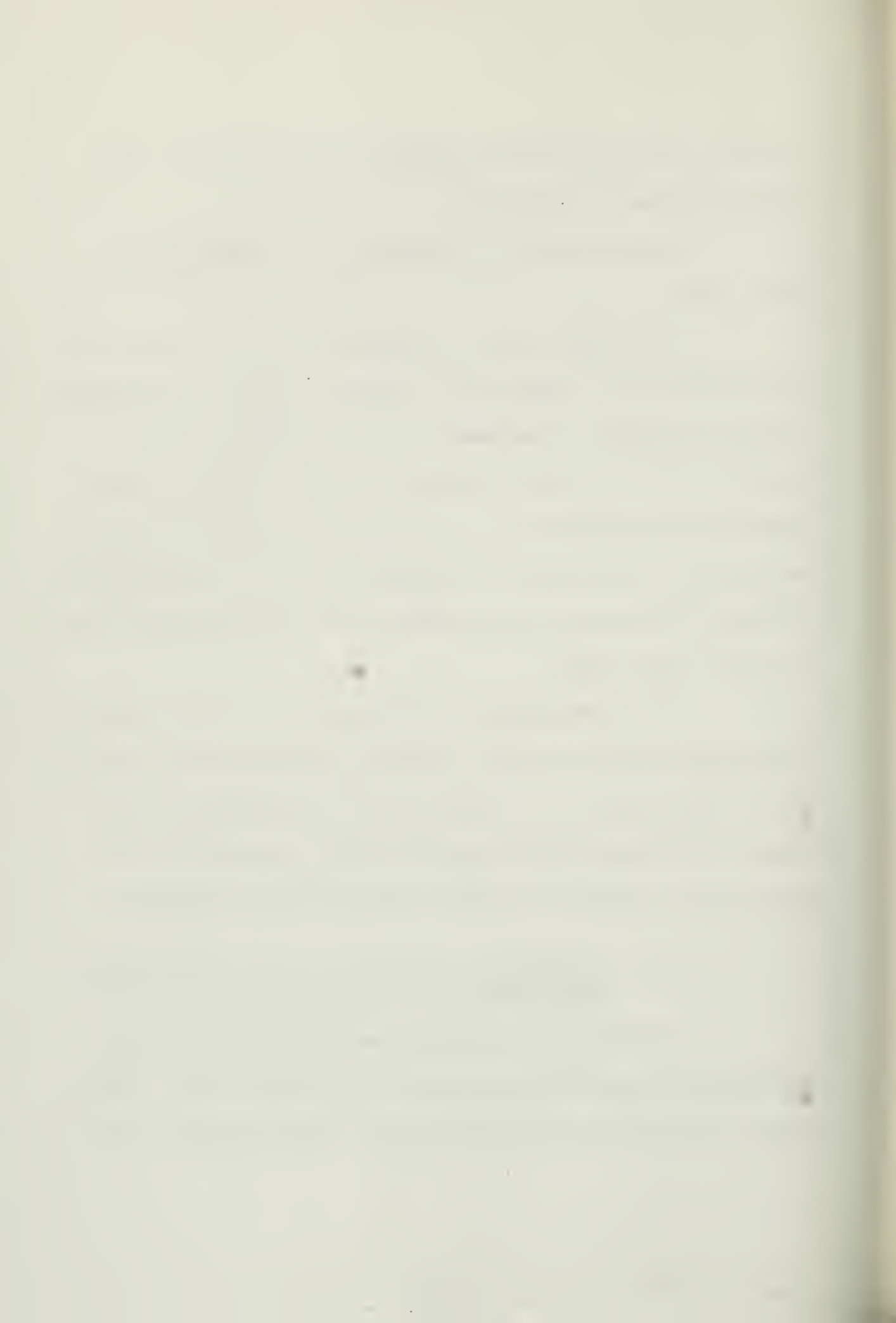
See also Roe v. Narragansett Electric Co., 166 A. 695.

In each of the foregoing cases the plaintiff was injured as a result of a contact with the defendant electric company's equipment, but nevertheless it was held that the electric company was not liable. In the present case there is no evidence that plaintiff came into contact with any of Hawaiian Electric's equipment, so that this case is even weaker for the plaintiff than the ones just cited.

The foregoing cases make it clear that Hawaiian Electric did not have any duty to render the government's property safe or to protect the plaintiff from injury resulting from changes in the condition of the government's premises brought about by the plaintiff.

5. Plaintiff's argument as to contributory negligence

Plaintiff is correct that the issue of contributory negligence is ordinarily for the jury. However, if the evidence is such that all reasonable men



would agree that the plaintiff was contributorily negligent, a verdict should be directed for the defendant.

In the present case the photographs of the Kunia installation, which were introduced in evidence, make it obvious that it was a high voltage electrical facility. Certainly all reasonable men would agree that this was so.

The evidence as to plaintiff's examination of the Kunia facility and his past experience in construction work around electrical facilities makes it obvious that all reasonable men would agree that he must have been aware of the nature of the Kunia facility (Tr. 365-375).

While the plaintiff had a right to assume that the installation was safe and that there was no electricity in the guy wire, he had a right to these assumptions only so long as he did not change the installation by detaching the guy wire from its ground anchor. No construction worker can possibly be unacquainted with the dangers of high voltage electricity and no construction worker, if he gave the matter the slightest thought, would fail to realize that it would be extremely dangerous



to alter a high voltage facility in any way and that detaching a guy wire from its anchor would instantly create the possibility that it would become energized through contact with a live wire. It is submitted that all reasonable men would agree with these propositions so that the trial court was correct in ruling that the plaintiff was guilty of contributory negligence as a matter of law.

In this the trial court is supported by the authorities.

In Rank v. Metropolitan Edison Co., 370 Pa. 107, 87 A.2d 198, the plaintiff's decedent, while gathering hay, found that the path of his harvester was blocked by a guy wire stretched across the hay field from a pole in the center of the field to a pole at the side of the field. The decedent removed one end of the guy wire from the pole in the center of the field and started to drag it toward the edge of the field. After he had dragged the guy wire about 140 feet, the guy wire came into contact with one of the defendant's high voltage lines and as a result the decedent was killed. The trial court granted a nonsuit on the ground that the decedent had been guilty

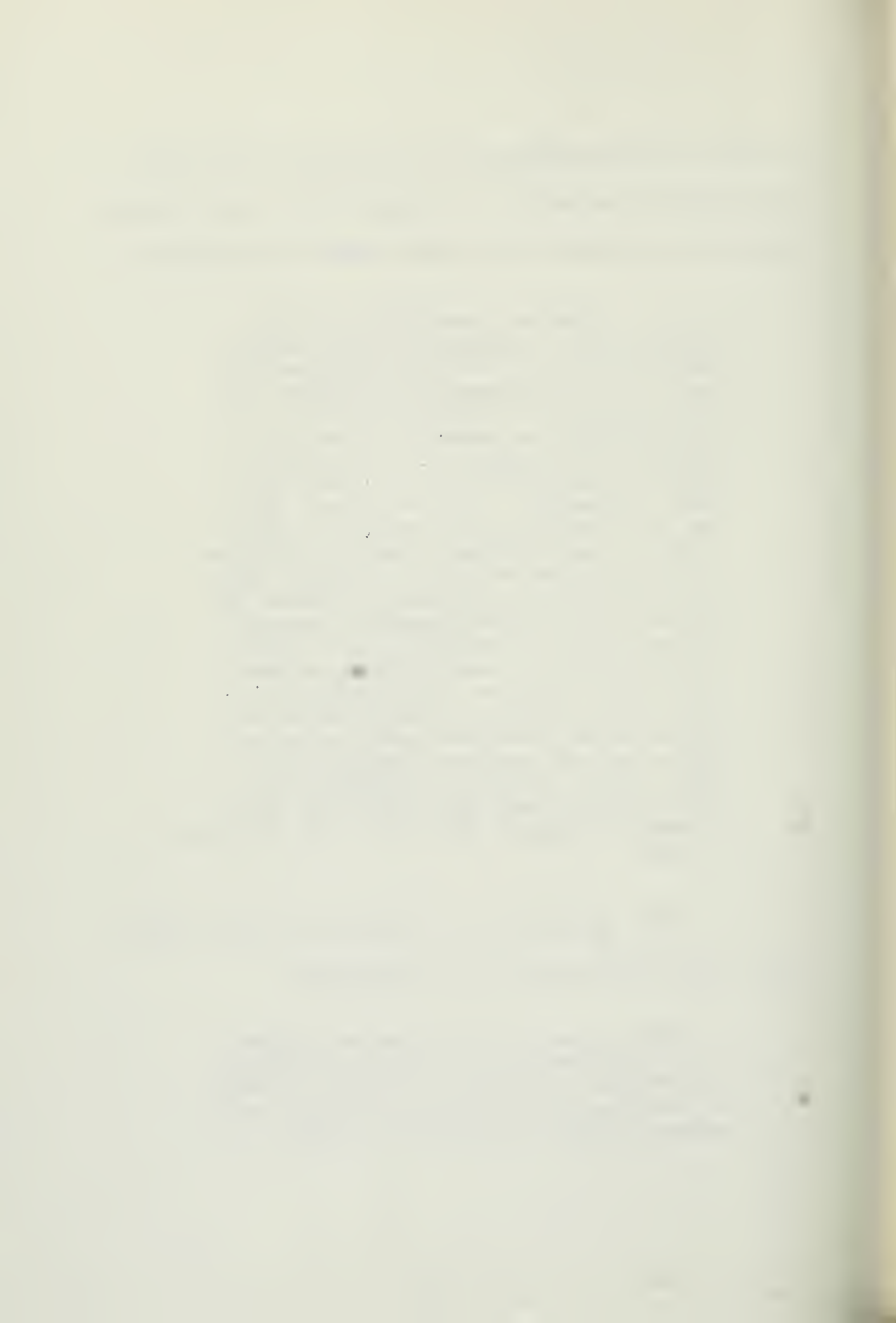


of contributory negligence as a matter of law and the plaintiff appealed. On appeal the court quoted from the decision of the trial court as follows:

"'. . . However, assuming that the defendant was chargeable with negligence, we are of the opinion that the facts and circumstances testified to in this case so clearly showed that the decedent was chargeable with contributory negligence that reasonable persons would not fail to agree with that conclusion. We are of the opinion that the decedent not only heedlessly brought himself into a position that the guy wire came in contact with the distribution circuit, but that the manner in which the decedent removed the guy wire and moved it in a direction in which it was certain to come in contact with the distribution circuit, was foolhardy. Any reasonable person would know that when two wires that were not insulated came into contact, one of which was charged with electricity, that the other was bound to become charged with it.'" 55 A.L.R.2d at 122.

The appellate court agreed with the trial court as is indicated by the following:

"There was no evidence or suggestion that the guy wire which of itself was sterile of electricity was affixed to the two poles in a manner that would produce danger to those in lawful



proximity or liable to come accidentally or otherwise in contact with it. It had remained, as originally affixed to the two poles, without incident. Only if tampered with and removed from its location could it become charged with electricity. It is not necessary to decide whether such possible removal fell within a foreseeable orbit of danger, for, assuming negligence on the part of the defendant, the decedent's action was a proximate cause of the accident making him clearly guilty of contributory negligence." 55 A.L.R.2d at 122 (emphasis added),

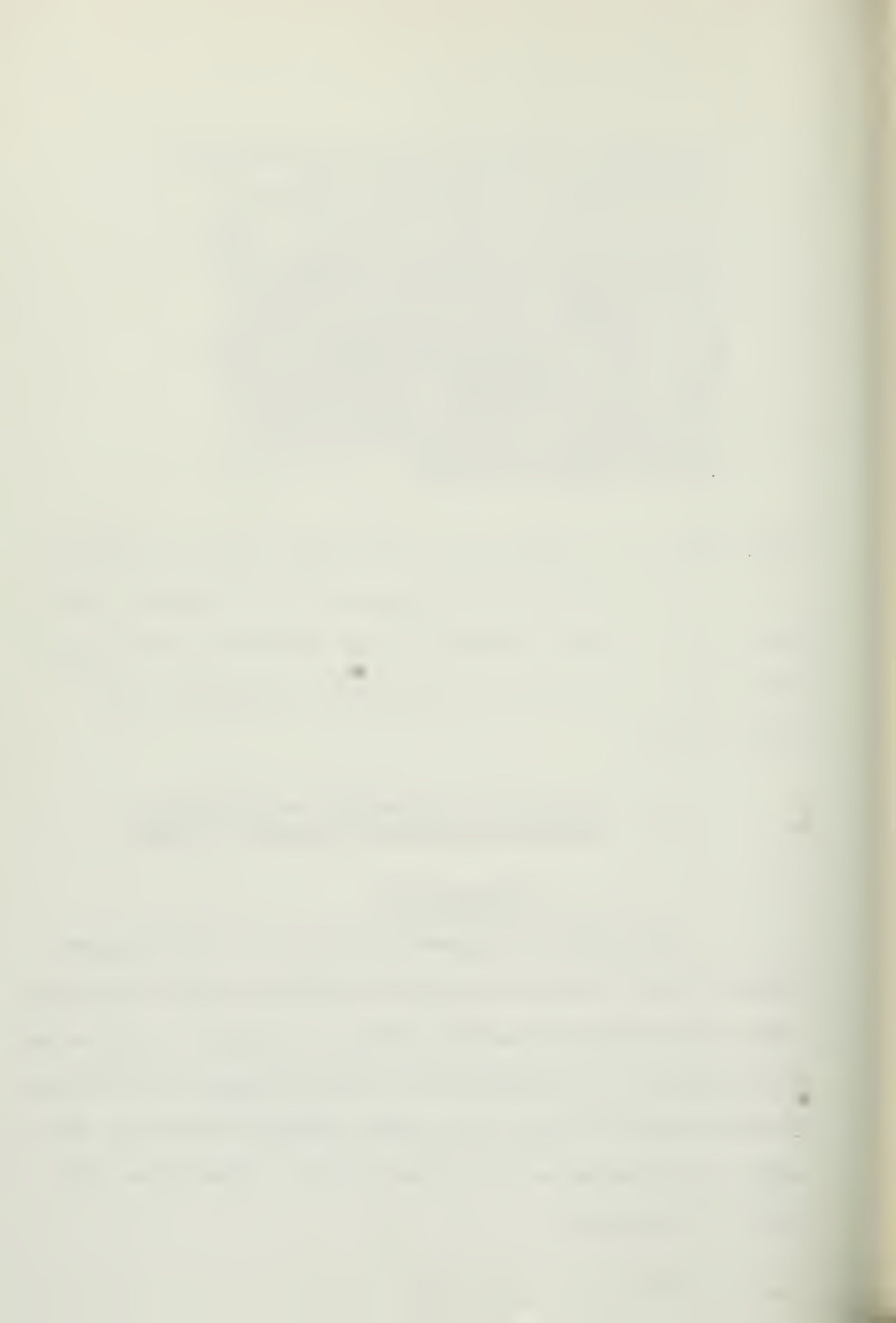
Accordingly, the decision of the trial court was affirmed.

In view of the foregoing, it is submitted that the trial court was correct in concluding that the plaintiff had been guilty of contributory negligence as a matter of law.

6. Plaintiff's argument that "Hawaiian Electric violated its duty to post"

a. Introduction

Plaintiff's argument here is that the National Electric Code and the rules of the Hawaii Public Utilities Commission required Hawaiian Electric to post a sign warning plaintiff of the presence of high voltage electricity and that since no sign was posted "Hawaiian Electric violated a government safety order and was, therefore, negligent" (O.B. 39).

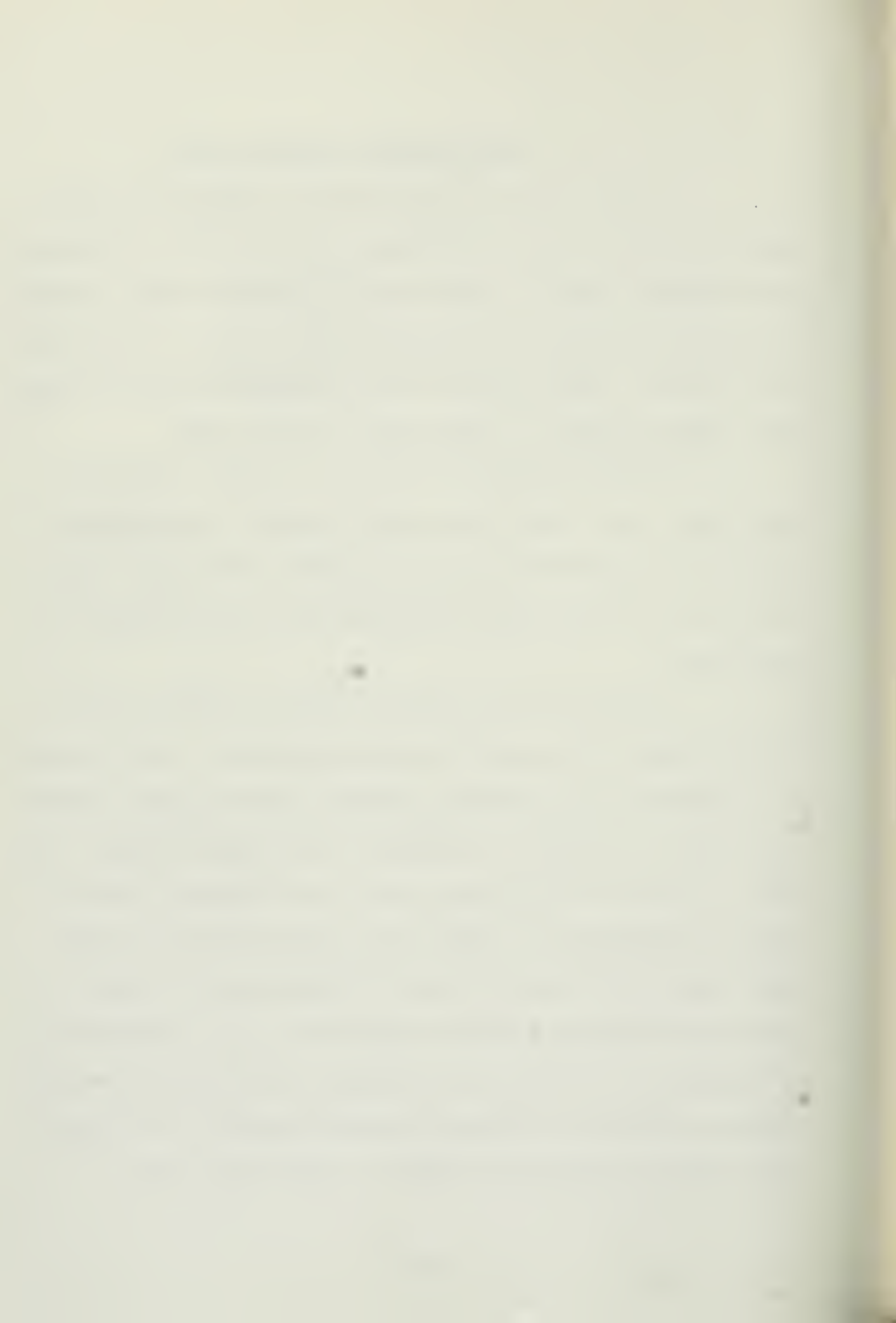


b. The National Electric Code

This portion of plaintiff's argument is based upon a provision of the National Electric Code. However, the National Electric Code was not admitted into evidence nor did the court take judicial notice of it. The plaintiff did not offer the Code into evidence nor did he make any offer of proof of any portion of the Code.

Since the Code is not in evidence, it seems that this court cannot determine whether the provision quoted by plaintiff actually applied to the Kunia facility so as to impose any duty upon any of the parties to this case.

Even if this court would take judicial notice of the Code, this would not help plaintiff. The evidence is uncontradicted that the accident involving Mr. Poston occurred on premises belonging to the United States. Indeed in the pretrial order one of the admitted facts is that on September 10, 1964, the United States "was the sole owner, occupier and user" of the Kunia facility where the Poston accident occurred (R. 46). There is no provision in this Code nor is there any evidence that the National Electric Code had any applicability to facilities owned by the United States. Therefore, it is



submitted that even if the plaintiff had offered the National Electric Code into evidence, the offer would have been rejected on the ground that the Code was irrelevant.

c.     The rules of the Public Utilities  
          Commission

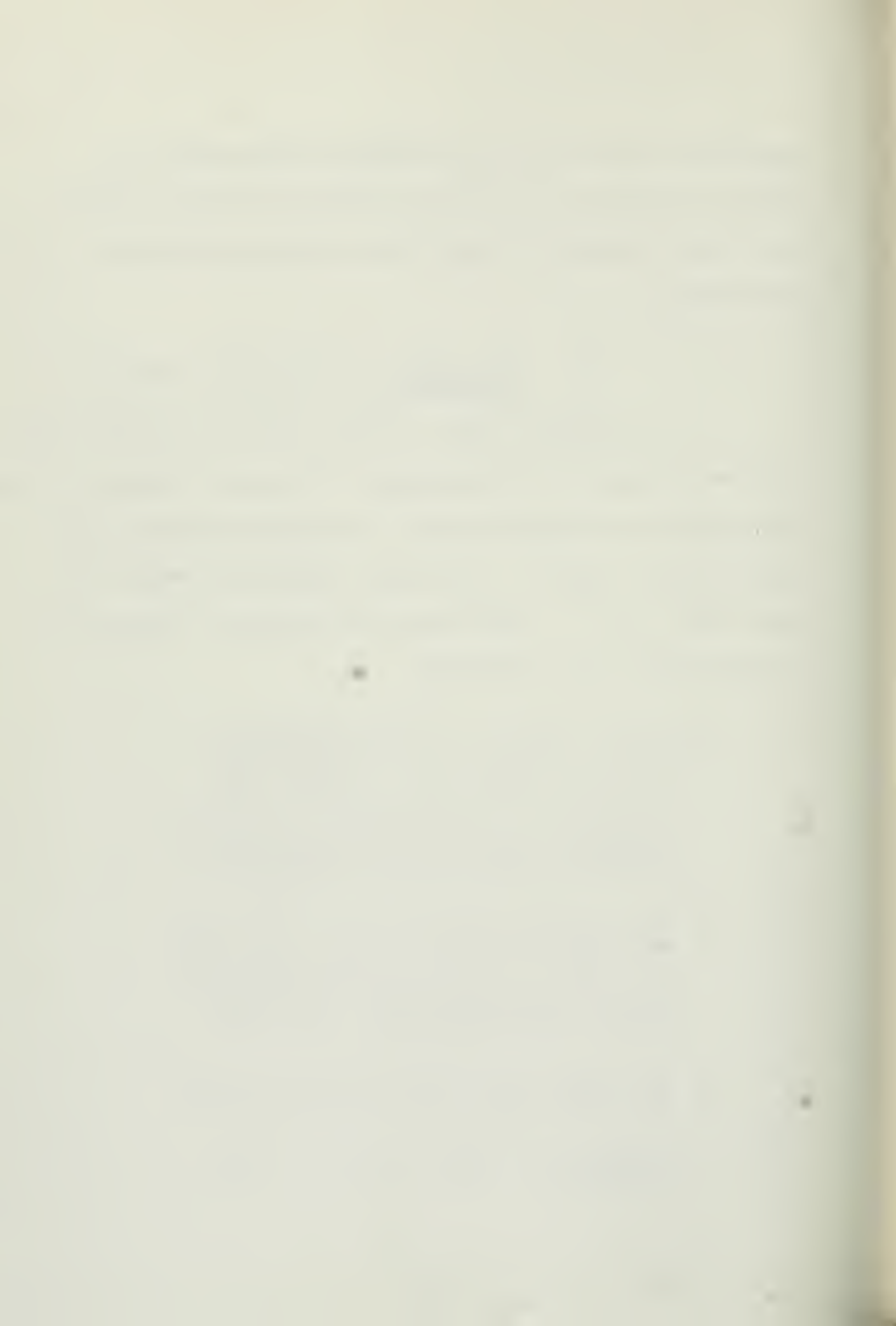
On page 38 of his opening brief plaintiff states that Mr. Zeigler, vice president of Hawaiian Electric, testified that Hawaiian Electric "was required to put up high voltage signs by the Public Utilities Commission rules (Tr. 434)". Apparently the testimony referred to on page 434 is the following:

"Q (By Mr. Ryan) At any installation where the Hawaiian Electric Company is delivering power in excess of 20,000 volts on the Island of Oahu is there a requirement that Hawaiian Electric Company post signs warning of the presence of high voltage?

"A The way you phrase it, no. What you are really trying to say is where we have high voltage, we put signs up, in accordance with the Public Utilities Commission rules. Is that what you are asking?

"Q All right, what signs do you put up in those instances?

"A We put up a sign that says, 'High Voltage'.



"Q And you put them on the poles?

"A We put them on the crossarms."  
(Tr. 434)

Thus, Mr. Zeigler's testimony was actually exactly the opposite of what plaintiff intended to convey in his argument, for Mr. Zeigler testified that there was no requirement that Hawaiian Electric post signs warning of the presence of high voltage at installations where Hawaiian Electric delivers power in excess of 20,000 volts.

Mr. Zeigler did testify that in accordance with Public Utilities Commission regulations, Hawaiian Electric did place high voltage signs on crossarms carrying Hawaiian Electric current. However, there is no evidence that Hawaiian Electric ever failed to comply with this requirement, or that there was any Hawaiian Electric crossarm at or near the site of the Poston accident carrying Hawaiian Electric current that did not have affixed to it a sign reading "High Voltage".

It is true that one of the admitted facts is that there was no sign at the Kunia installation warning of the existence of high voltage electricity. However, there is no evidence that Hawaiian Electric had any duty to post any such sign, and in view of the admitted fact



that the United States was the sole owner, occupier and user of the facility, it seems clear that Hawaiian Electric did not have any power, much less any duty, to put up any high voltage signs.

It is submitted that the plaintiff has pointed to no evidence whatsoever to support his argument that "Hawaiian Electric violated its duty to post".

B. Answer to plaintiff's arguments pertaining to the pretrial order, blueprint Y & D 872808 and res ipsa loquitor

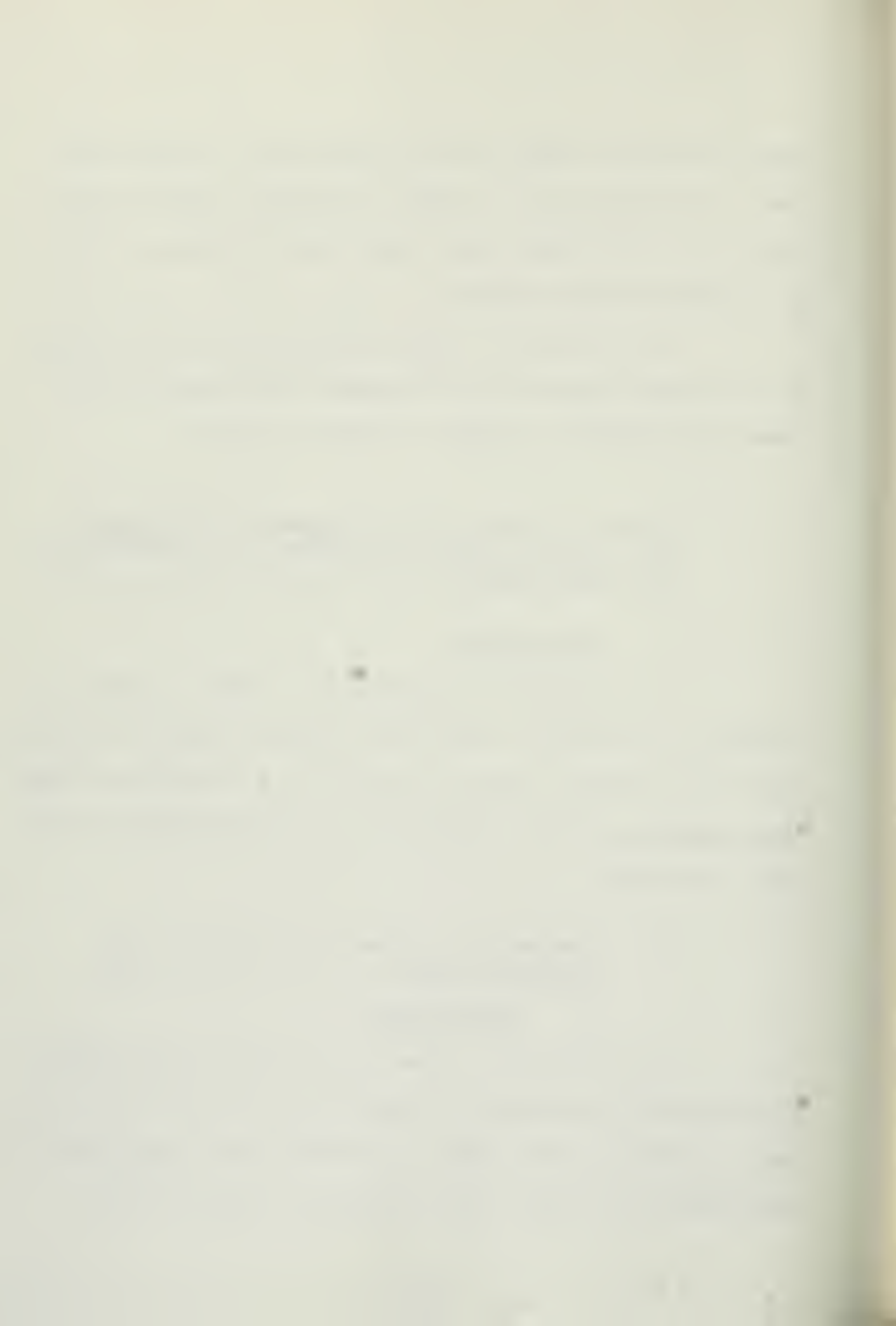
1. Introduction

In section IV of plaintiff's brief on pages 57 through 75, plaintiff sets forth various arguments pertaining to the pretrial order, blueprint Y & D 872808 and res ipsa loquitor. These arguments will be considered in the order presented.

2. Plaintiff's argument relative to the pretrial order

a. Introduction

As stated, the issue to be decided as to Hawaiian Electric is whether the court was justified in directing a verdict in its favor. Plaintiff has a long list of complaints as to the court's action in respect to the



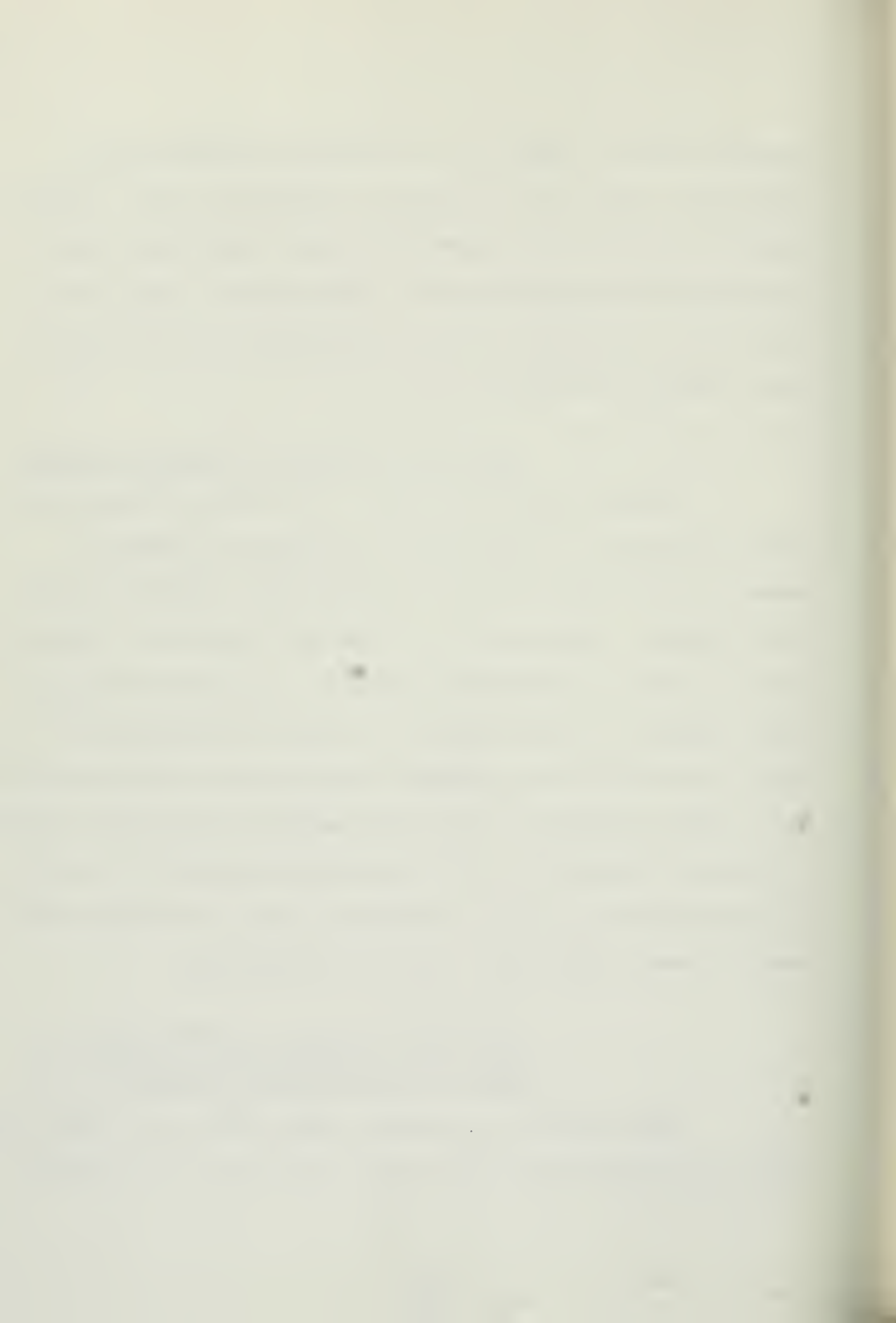
pretrial order. Even if all of these complaints were justified, that would not seem to change the issue, namely, whether the court was warranted in directing the verdict in favor of Hawaiian Electric. Nevertheless, each of the plaintiff's complaints will be considered in the order in which they are presented.

b. Plaintiff's motion re punitive damages

On page 59 of his brief, the plaintiff complains about the action of the court in denying his motion to amend the pretrial order to reinstate his demand for punitive damages. Plaintiff's attorney had signed the pretrial order in which no claim was asserted for punitive damages and, therefore, it was within the court's discretion to allow or disallow the amendment requested by the plaintiff. The court's refusal to allow the amendment certainly played no part in the trial court's directing a verdict in favor of Hawaiian Electric and, therefore, even if the court had made an error, such error was not prejudicial.

c. The court's action in respect to plaintiff's reference to the pretrial order in his opening statement

The plaintiff complains that during the course of his opening statement to the jury the trial court stopped



him from referring to issues of fact admitted by the parties in the pretrial order. Previously plaintiff had referred to all of the facts admitted in the pretrial order and had outlined his theory of liability as to each defendant. Thus, the court was not preventing plaintiff from outlining his entire case to the jury prior to trial. The court also made it clear to plaintiff that he could put before the jury the issues of fact that had been admitted, but that this should not be done in the opening statement. It is hard to see how the plaintiff was prejudiced by the court's action.

d. Elimination of the safe place to work theory

On pages 59 and 60 plaintiff complains of the court's elimination of the safe place to work theory from the plaintiff's case. Hawaiian Electric does not believe that this issue in any way concerns it. The safe place to work theory is mentioned in the plaintiff's theory as to the United States, but not in plaintiff's theory as to Hawaiian Electric.

In the issues of law as set forth in the pretrial order, issue number 5 is as to whether the United States was the plaintiff's employer within the meaning of section

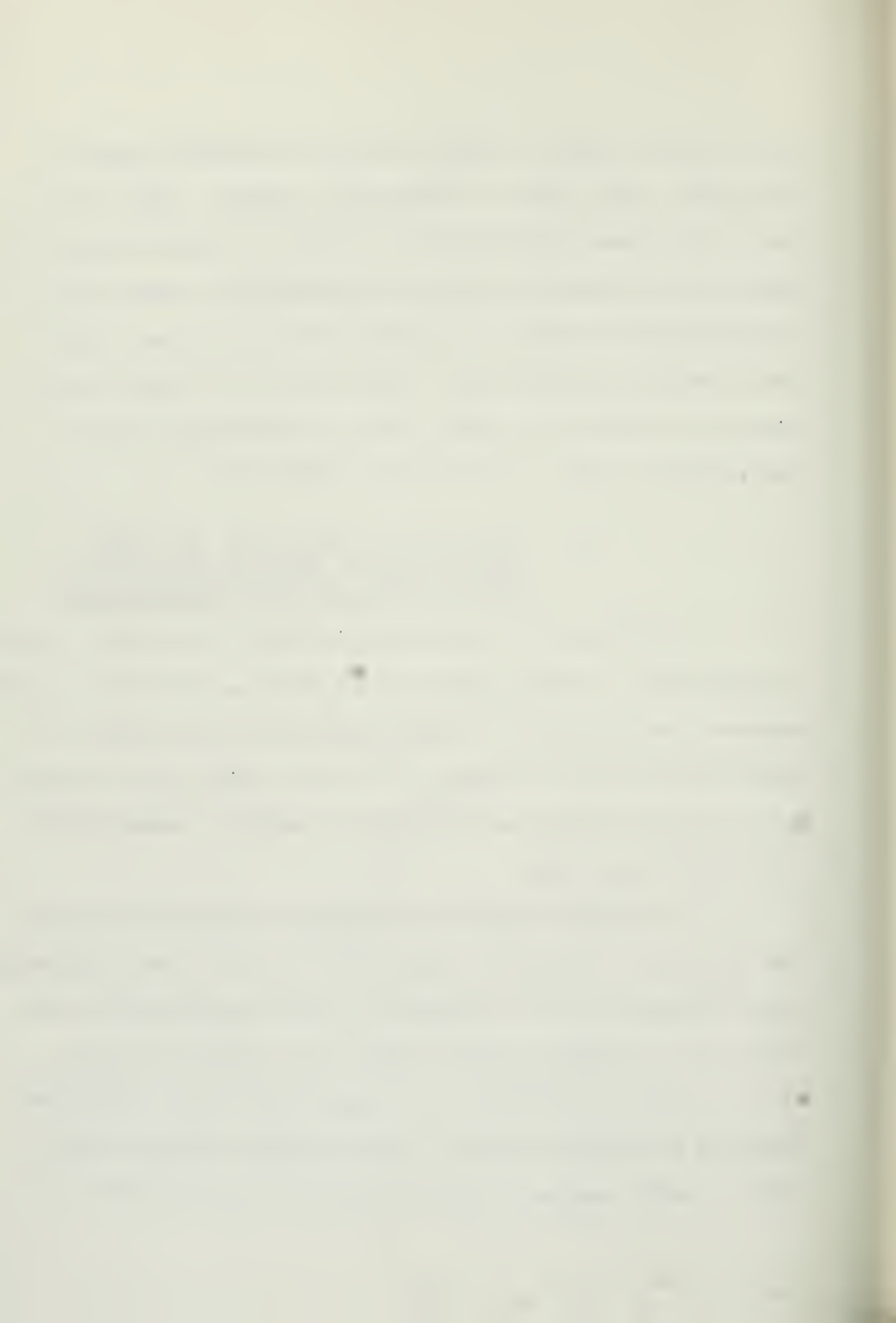


96-4, Revised Laws of Hawaii 1955, as amended, which is the Hawaii Safe Place of Employment Statute. Thus, it does not appear that Hawaiian Electric is involved in this issue. However, it may be noted that, since this was an issue of law, it had to be decided by the trial court one way or the other. Thus, what the trial court did was to decide the issue, not to eliminate it from the pretrial order, as claimed by plaintiff.

- e. Plaintiff's claim that the court failed to hold Hawaiian Electric to stipulations in the pretrial order

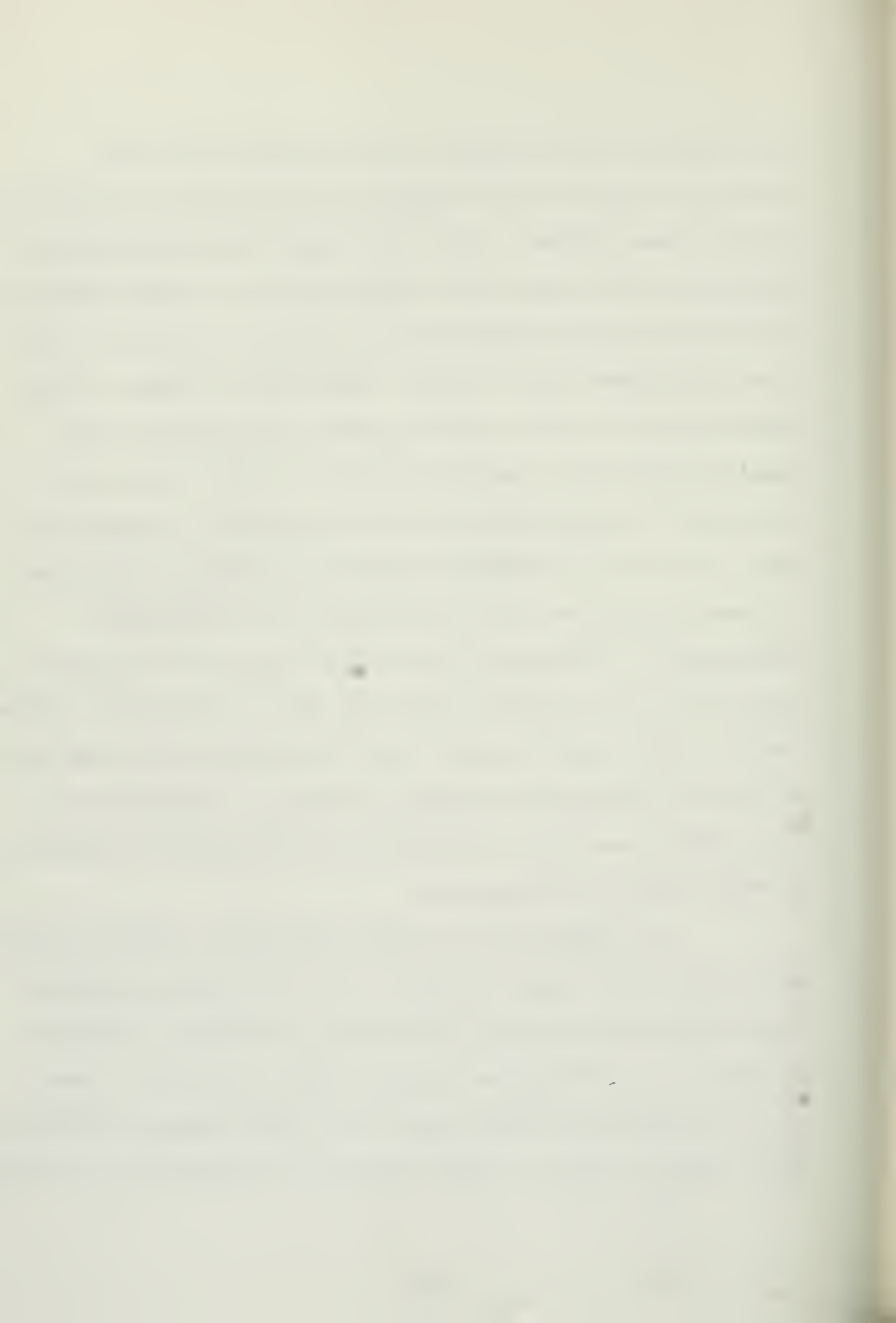
On page 60 of plaintiff's brief, plaintiff asserts a claim that is quite difficult to follow. It is not clear whether the plaintiff is complaining about misconduct by Hawaiian Electric's counsel, or of the trial court's failing to require Hawaiian Electric to abide by stipulations in the pretrial order.

Plaintiff refers to arguments advanced by Hawaiian Electric's counsel at pages 847 to 849 of the transcript. These arguments were in support of Hawaiian Electric's motion for a directed verdict made at the close of plaintiff's evidence (Tr. 802). On page 846 of the transcript Hawaiian Electric's counsel started going through plaintiff's claims against Hawaiian Electric as set forth in



the section of the pretrial order entitled "III (a). Plaintiff's Theory" and showing how the evidence failed to support these claims. The trial court became momentarily confused at this point (Tr. 848) because he asked Hawaiian Electric's counsel whether he knew when he signed the pre-trial order that these "facts" were not as claimed by the plaintiff and, if so, why he signed the pretrial order. Hawaiian Electric's counsel pointed out that these were not facts to which Hawaiian Electric agreed, nor were they facts set forth in Hawaiian Electric's theory of the case, but were merely the claims asserted by the plaintiff. Furthermore, in Hawaiian Electric's theory of the case as set forth in the pretrial order (R. 44), plaintiff's claims are expressly controverted. How this could evince any lack of candor by Hawaiian Electric's counsel, plaintiff does not explain, and it is submitted that plaintiff's complaint in this respect is frivolous.

In connection with this complaint, plaintiff goes on to state that "most of these facts had been stipulated to by Hawaiian Electric in the Pre-trial Order" referring to pages 47 and 48 of the record, items 10 and 15. Item 10 of the admitted facts states only that Hawaiian Electric was a public utility in the business of operating electrical



installations to generate and transmit high voltage electricity, while item 15 states that on September 10, 1964, Hawaiian Electric was the owner of a metering transformer, certain meters, and conductors running between said transformer and said meters, located at the Kunia facility, and of the power lines transmitting power to the air switch on top of the poles at Kunia. Obviously, these admitted facts were not the same as the facts alleged by plaintiff in its theory as to Hawaiian Electric. Plaintiff then states that the court prejudiced the plaintiff "by omitting to hold Hawaiian Electric to these stipulations" (O.B. 60). What the plaintiff is talking about is not clear for the plaintiff fails to point to any place in the record where Hawaiian Electric at any time attempted to depart from any of the facts set forth in items 10 and 15 of the admitted facts in the pretrial order.

- f. Plaintiff's complaint that the court amended the pretrial order by declaring that it was not going to submit to the jury the question of whether Hawaiian Electric had a duty to post any notices

On page 61 of his brief plaintiff complains that the trial court amended the pretrial order by declaring that it would not submit to the jury the question of whether

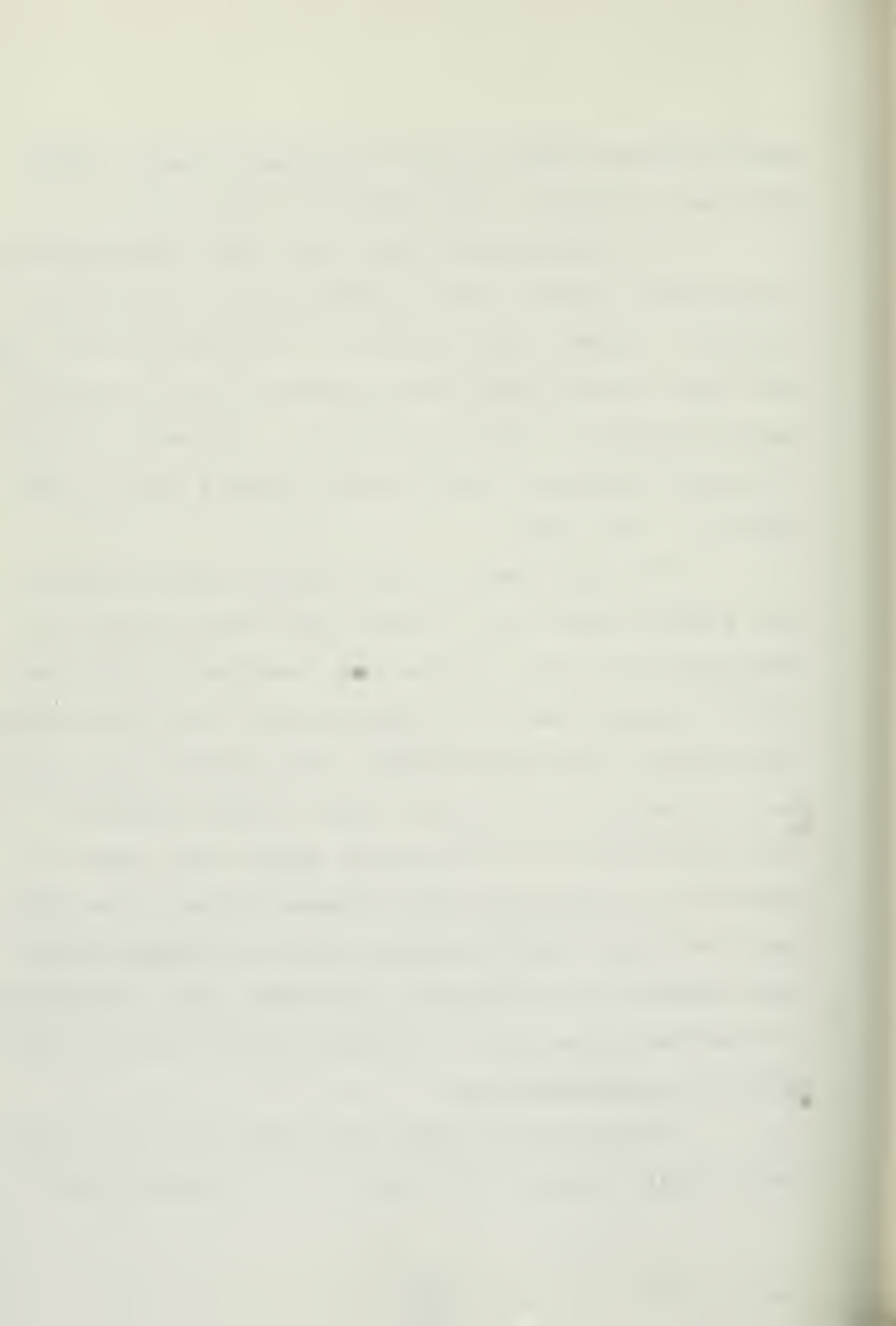


Hawaiian Electric had a duty to post any notices. Plaintiff then referred to page 854 of the transcript.

An examination of page 854 of the transcript does not indicate that the court amended the pretrial order in any way. Instead, the court said, "I can't advise the jury that there was any duty of the government or the Hawaiian Electric Company to post any notices. We haven't got any testimony here which I think would justify a duty to post notices." (Tr. 854).

The fact that an issue may have been set forth in a pretrial order does not mean that the issue will be submitted to the jury. Before any issue can be submitted to the jury there must be evidence giving rise to the issue, and if there is no such evidence, obviously the issue cannot be submitted to the jury. This is what happened in the present case. The trial court simply found that the plaintiff had not adduced any evidence from which the jury could infer that Hawaiian Electric had any obligation to post any notice and, therefore, the issue could not properly be submitted to the jury. Obviously this was not an amendment of the pretrial order.

It may also be noted again that at no point has the plaintiff in his brief pointed to any evidence which



would give rise to any duty on the part of Hawaiian Electric to post any notices.

g. Plaintiff's complaint that the court eliminated the third issue of law  
from the pretrial order

On page 62 of his brief plaintiff complains that the trial court eliminated the third issue of law set forth in the pretrial order. Actually the plaintiff also complained about the elimination of issues of law numbers 1 and 2. However, since these concern only the United States, they will not be considered here.

Issue of law number 3 was as follows:

"If the evidence establishes that defendant Hawaiian Electric Company, Inc. was supplier of high voltage electricity and was part owner and permissive occupier and user of the electrical installation premises and had the exclusive right to maintain the same, then did said defendant owe a duty of ordinary care to plaintiff to warn him of any hidden danger that might have existed at or near his place of employment?" (R. 55).

The evidence simply did not establish the facts upon which this issue of law was expressly predicated. Admitted fact number 15 in the pretrial order includes the fact that Hawaiian Electric transmitted power to the air switch on top of the poles at Kunia (R. 48) and Mr.



Zeigler testified that the point of delivery of the electric current to the United States was the point where Hawaiian Electric's wires were attached to the air switch (Tr. 1251-1252). Mr. Zeigler also testified that Hawaiian Electric had no control over the current on the government's premises, such current being controlled by the government's air switch which Hawaiian Electric had no right to manipulate (Tr. 1252). There was no evidence that Hawaiian Electric was "part owner and permissive occupier and user of the electrical installation premises". On the contrary, admitted fact number 6 of the pretrial order was that the United States was "the sole owner, occupier and user" of the Kunia facility which was under the United States' "care, custody, supervision, management and control" (R. 46). Hawaiian Electric did own the metering transformer and the meters and the insulated wires running between the two. However, Hawaiian Electric did not own any interest in the land, the poles, the crossarms, the guy wires, the fence around the poles or the wires running down from the air switch to the metering transformer all of which were owned by the United States.

The evidence also was that Hawaiian Electric did not have "the exclusive right to maintain the [electrical



installation premises]" and in fact did not maintain it at all. Mr. Zeigler testified that Hawaiian Electric did not maintain the installation (Tr. 1253). Furthermore, Order 1086 of the Hawaii Public Utilities Commission, Rules and Rate Schedules Applicable to Electric Service (exhibit H-1, Rule 14, ¶ F) makes it clear that the maintenance of the "electrical installation premises" was the responsibility of the United States.<sup>2/</sup>

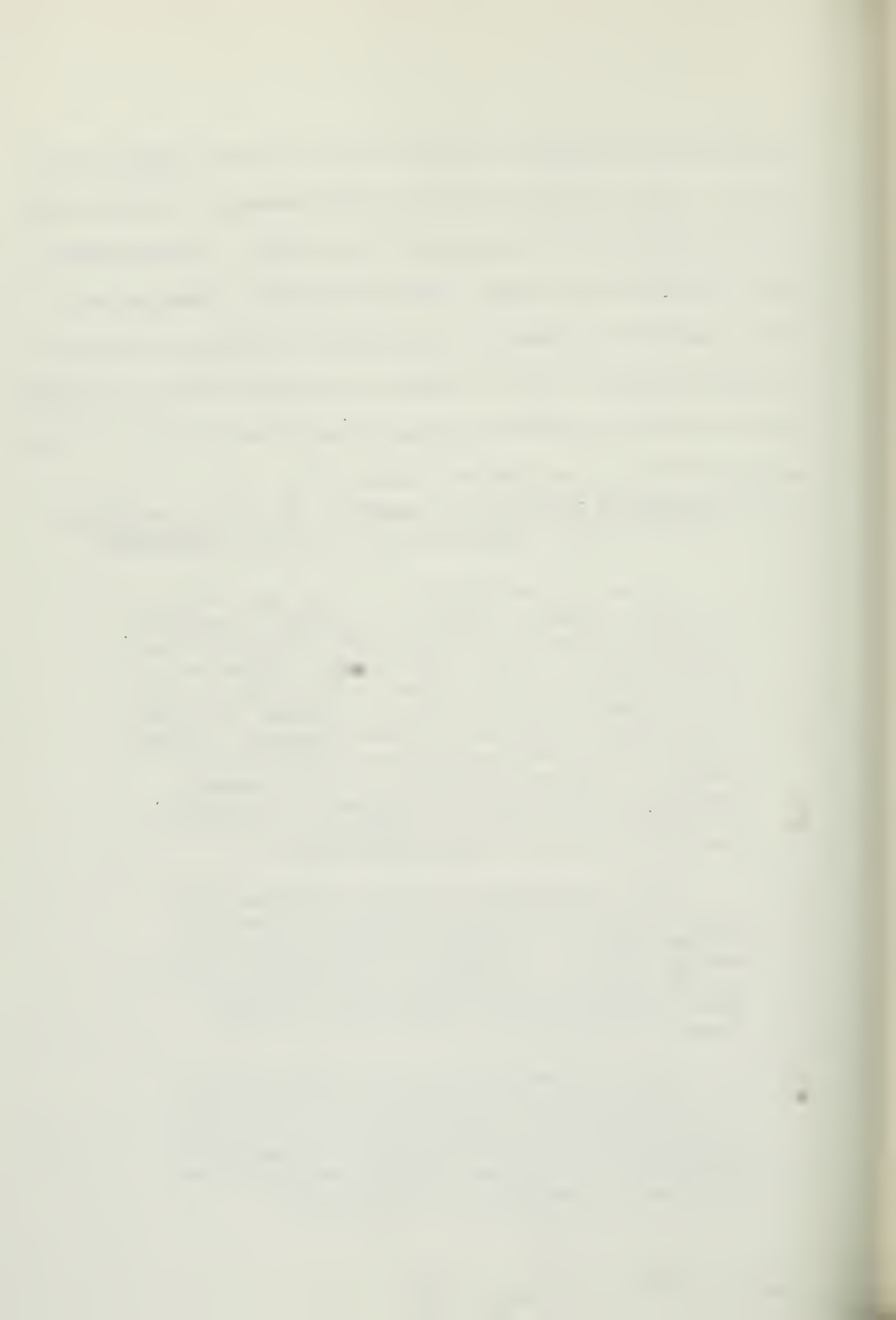
2/ Paragraph F of Rule 14 on sheet 30 of Ex. H-1 is as follows:

"F. CUSTOMER RESPONSIBILITY FOR HIS EQUIPMENT

"The customer shall, at his own sole risk and expense, furnish, install, inspect and keep in good and safe condition all electrical wires, lines, machinery, apparatus and equipment of any kind or character which may be required for: (1) receiving electric energy from the lines of the Company, regardless of the location of the transformers, meters or other equipment of the Company; and (2) applying and utilizing such energy, including all necessary protective equipment and suitable housing therefor.

"The customer shall also transmit and deliver and be solely responsible for the transmission and delivery of all electric energy over or through the customer's wires and equipment, regardless of the place where such electric energy may be transformed or metered.

"The Company will not be responsible for any loss or damage occasioned or caused by the negligence, want of proper care or wrongful act of the customer, his agents, employees or licensees in installing lines, machinery, apparatus or equipment."



Since the facts upon which this issue of law was predicated were not established by the evidence, the issue did not arise and there was no need for the court to pass upon it.

h. Plaintiff's complaint that the court demolished the pretrial order

On pages 64 and 65 of his opening brief the plaintiff complains that the court completed the demolition of the pretrial order by deciding all of the issues of fact and dismissing the jury. So far as Hawaiian Electric is concerned the court did not decide any issues of fact. The court simply concluded that there was no evidence from which the jury might infer that Hawaiian Electric had been guilty of any negligence. This being the case the court had no alternative but to grant Hawaiian Electric's motion for a directed verdict. The court's action in so doing did not constitute an amendment of the pretrial order but simply a recognition of the fact that plaintiff had failed to adduce any evidence against Hawaiian Electric which gave rise to any issues to be submitted to the jury.

i. Plaintiff's complaint that the court refused plaintiff's requests to amend the pretrial order

As will be seen in answer to plaintiff's next



argument, plaintiff failed to establish a sufficient foundation for the admission of the Y & D blueprint. Furthermore, the blueprint would have been relevant only to some claim that the installation had been defectively constructed. However, although such a claim had been made in plaintiff's complaint, it had been dropped from the pretrial order which plaintiff's attorney had signed. A complaint based upon defective construction would have been vastly different from the case presented by the pretrial order and, therefore, there certainly was no abuse of discretion by the court in refusing to amend the pretrial order so as to allow the introduction of the Y & D blueprint. So far as the plaintiff's complaint based upon the doctrine of res ipsa loquitor is concerned, this doctrine certainly would not have been available to the plaintiff in respect to its claim against Hawaiian Electric for the uncontradicted evidence was that Hawaiian Electric did not control the facility where the accident occurred or the particular portion of the facility involved in the accident.

In view of the foregoing it is submitted that the plaintiff has failed to show any prejudicial conduct by the court in its handling of the pretrial order.



3. Plaintiff's argument relative to  
blueprint Y & D 872808

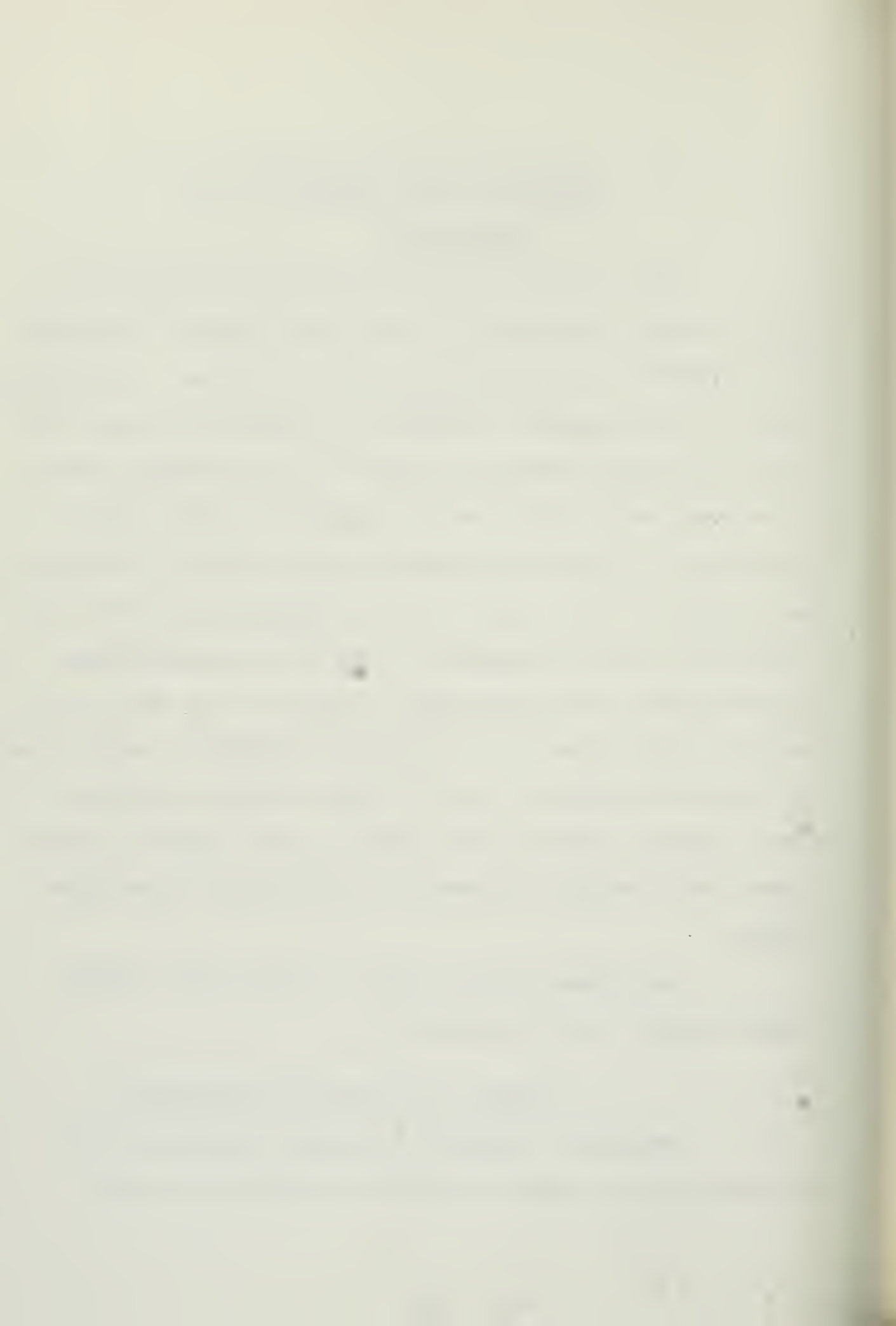
a. Introduction

This section of the plaintiff's brief which appears at pages 65 through 72 under the subtitle "Blueprint Y & D 872808" is extremely difficult to follow. During the course of the argument plaintiff does not specify what action by the trial court is claimed to be reversible error. At the very end of this section plaintiff states that he is entitled to have the judgments below reversed either on the ground that the court erred in denying plaintiff's motion for an order allowing an inspection, photographing and measuring of the government premises or on the ground that the court erred in restricting plaintiff's examination of "the expert witness for the United States Government" and in denying plaintiff the right to show that the transformer was installed "backwards and contrary to the blueprints".

An attempt will be made to answer the various claims asserted by the plaintiff.

b. Claim of defective construction

While the complaint contained allegations that the installation where the accident occurred had been



defectively constructed, this claim was abandoned during the course of the pretrial hearing and was not included in any of the plaintiff's theories as set forth in the pretrial order. Although plaintiff says that this ground was "eliminated" by Judge Mathes from the pretrial order, the fact remains that plaintiff's attorney signed the pretrial order and, thus, indicated that it accurately set forth plaintiff's theories against the various defendants. Thus, it is clear that the plaintiff does not have any basis for complaining that he was prevented from attempting to show that the facility had been defectively constructed.

c. Claim in respect to denial of motion to inspect and photograph the government premises

Plaintiff claims that he is entitled to a reversal of the judgments below on the ground that the trial court erred in denying plaintiff's motion made just a week before the trial that plaintiff be allowed to inspect and photograph the premises where the accident happened. The only statement in support of this contention appears on page 71 of plaintiff's brief to the effect that pictures taken prior to trial "would have shown that the transformer had been rotated 180 degrees after the accident and was,



finally, in a safe condition, and, finally, installed according to the blueprints, by Hawaiian Electric."

Note that plaintiff does not say that the photographs would have shown that the installation was unsafe at the time of the accident or even that it had been defectively constructed. Nor does plaintiff claim that the photographs would have enabled him to determine how the guy wire involved in the accident became energized. All that plaintiff says is that photographs would have shown that the transformer "had been rotated 180 degrees".

Since defective construction was no longer an issue in the case, it is hard to see how the fact that the transformer was in a different position at the time of trial from what it had been at the time of the accident was relevant or could have been used by the plaintiff in cross examining any of the witnesses. Furthermore, even if the reversal of the transformer had been relevant, it is difficult to see how the plaintiff was prejudiced by the denial of his motion to take photographs, since, in any event, he knew that the transformer had been rotated and could have made any proper use of this knowledge in cross examination without having photographs to assist him. However, the record does not indicate that he made any such attempted use of this information.



Plaintiff cites authority that evidence of subsequent repairs or alterations or precautions may sometimes be admissible in evidence "as going to the credibility of witnesses". Plaintiff does not say how this rule fits this case or what witnesses he is talking about or how their credibility would be affected or why he needed photographs to introduce evidence of subsequent repairs, alterations or precautions.

In discussing Hyndman v. Pennsylvania Railroad Company, 386 Penn. 190, 152 A.2d 251, which stands for the proposition that a plaintiff may show that a warning sign had been installed after the accident as evidence on the question of whether it was practical for the defendant further to guard the premises, plaintiff stated that "warning signs were placed on the transformer at the Kunia facility after the accident, as photographs would have shown" (O.B. 72). In the first place, there is absolutely no evidence in the record of this by offer of proof or otherwise. In the second place, the statement is false in that no signs whatsoever have at any time been placed upon the transformer at the Kunia facility or upon any other property at the Kunia facility belonging to Hawaiian Electric.

However, even assuming that warning signs had been installed at the Kunia facility subsequent to the



accident and assuming that plaintiff had the right to cross examine the witnesses in respect to such signs, he certainly was not precluded from doing so by the lack of photographs. Had it been proper to do so, plaintiff could have inquired of the witnesses whether any such signs had been installed subsequent to the accident. However, according to the record, no such inquiry was ever made.

The other case cited by the plaintiff on this issue is Houston Lighting and Power Company v. Brooks, 319 S.W.2d 427, where a defense witness had testified that it would have been difficult to move or de-energize certain electric wires. Plaintiff in that case was permitted to ask a defense witness if the wires had not, in fact, been moved and de-energized subsequent to the accident. Obviously this case is not applicable to the present case since no evidence was adduced by the defense that would have been rebutted by anything shown in any photographs taken of the site in its pretrial condition. However, even if evidence of subsequent changes had been admissible on this principle, plaintiff was not precluded from offering the evidence by lack of photographs.

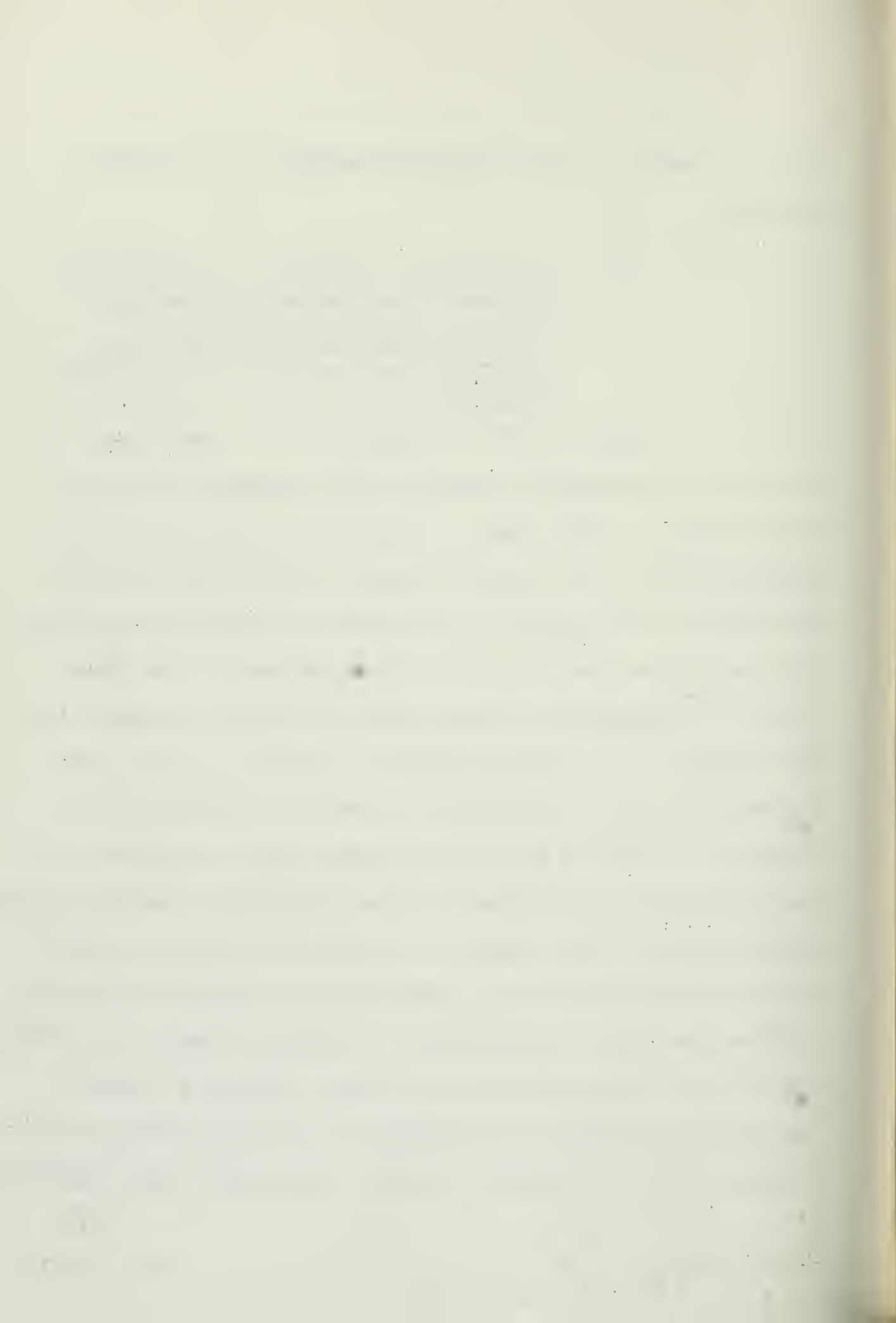
In view of the foregoing, it is submitted that the court committed no error in denying plaintiff's motion that



he be allowed to inspect and photograph the government premises.

- d. Plaintiff's argument re restriction of cross examination of government expert and denial of plaintiff's right to show that the transformer was installed contrary to the blueprints
- 

On page 72 of his brief plaintiff sets forth as one of the grounds for reversing the judgments below the claim that the trial court erred in restricting the cross examination of "the expert witness for the United States government" and in denying plaintiff the right to show that the transformer had been installed contrary to the blueprints. Although this claim seems to actually consist of two claims, it is believed that it relates solely to the plaintiff's cross examination of one of the government's witnesses. This is because any claim that the transformer had been installed contrary to the blueprints standing alone would seem to relate only to a claim of defective construction which, as heretofore indicated, was abandoned by plaintiff before trial. Furthermore, it appears that the restricting of the cross examination of which plaintiff complains was cross examination in respect to the Y & D blueprint. Therefore, it is probable that the claim here being asserted



is that the trial court erred in limiting the examination of the government witness by refusing to permit him to testify as to the Y & D blueprint.

Although the plaintiff does not indicate which witness he is referring to on page 72 of his brief, it appears that he means the government's witness Ponte because this is the only government witness whose testimony is discussed in this section of the brief. Actually, Ponte was not called as an expert witness but was called to testify as to various facts he observed immediately following the accident. The government did call witness Allen as an expert. However, Mr. Allen's testimony is not discussed in this section of plaintiff's brief, nor did plaintiff make any attempt to cross examine Mr. Allen in respect to the Y & D blueprint.

Plaintiff's discussion of the examination of Ponte appears on pages 66 and 67 of his brief. Ponte was a government electrical inspector who was inspecting the work being done at the Kunia facility at the time of the Poston accident. This work did not involve that portion of the facility which consisted of the poles, the metering transformer and the meters and, therefore, Ponte had no reason to inspect it (Tr. 1094), although he did testify that on direct



examination by the United States that he had inspected the guy wires at the facility and noticed that they were taut (Tr. 1098). Plaintiff claims on page 67 of his brief that the court refused to allow plaintiff to cross examine Ponte as to whether Ponte had referred to the Y & D blueprint in making his inspection and in this respect refers to pages 1116 and 1117 of the transcript. An examination of this portion of Mr. Ponte's testimony does not support the plaintiff's claim.

The testimony referred to is as follows:

"Q I see. Well, now, when you went up there to inspect it, did you have the blueprint or the plans with you?

"A No, sir. The blueprints are actually left down in the field office, and we look at them quite often, sir.

"Q And so you've looked at the blueprint of this installation, right? You have since then, haven't you?

"A Yes. This installation was the one that was there.

"Q So you looked at the blueprints --

"MR. STIFEL: Excuse me, Mr. Ryan. What blueprints are you talking about?

"A That's right.

"Q (By Mr. Ryan) The blueprints on the installation that you inspected?



"A I did not look at any blueprint on that --

"MR. STIFEL: Excuse me, Mr. Ponte.

"Are you talking about the blueprint for the work being done by Reed & Martin?

"Q (By Mr. Ryan) I'm talking about the blueprint of the installation that you inspected, you know, the installation where -- the transformer installation on G-7-A.

"MR. STIFEL: Your Honor, the witness has not said he ever had any such blueprints in the first place. And in the second place, the existence of any such blueprints is immaterial in this case, what blueprints --

"THE COURT: I will sustain the objection upon the ground it is not material whether he had any blueprints or not. . . ." (Tr. 1334-1337).

The purport of this testimony seems to be that as to the blueprints of the work then in progress in September 1964, these were left in the field office so that Ponte did not take them with him when he inspected the area where the accident occurred. As to Y & D blueprint 872808 the testimony seems to be that Mr. Ponte did not look at it for when Mr. Ryan indicated that he was talking about the "blueprints on the installation", Mr. Ponte answered, "I did not look at any blueprint on that --".



Following the testimony just quoted the court asked several questions as to when Ponte had inspected the guy wire and how long the poles and guy wires had been in place and then Mr. Ryan made his offer of proof.

From the foregoing, it does not appear that the judge actually refused to allow cross examination as to whether Ponte had referred to the Y & D blueprint when he made his inspection in September 1964. If this is true, then there would seem to be no basis for plaintiff's claim that the court restricted plaintiff's examination of Mr. Ponte. It would also mean that there was no basis for the offer of proof which the plaintiff then made.

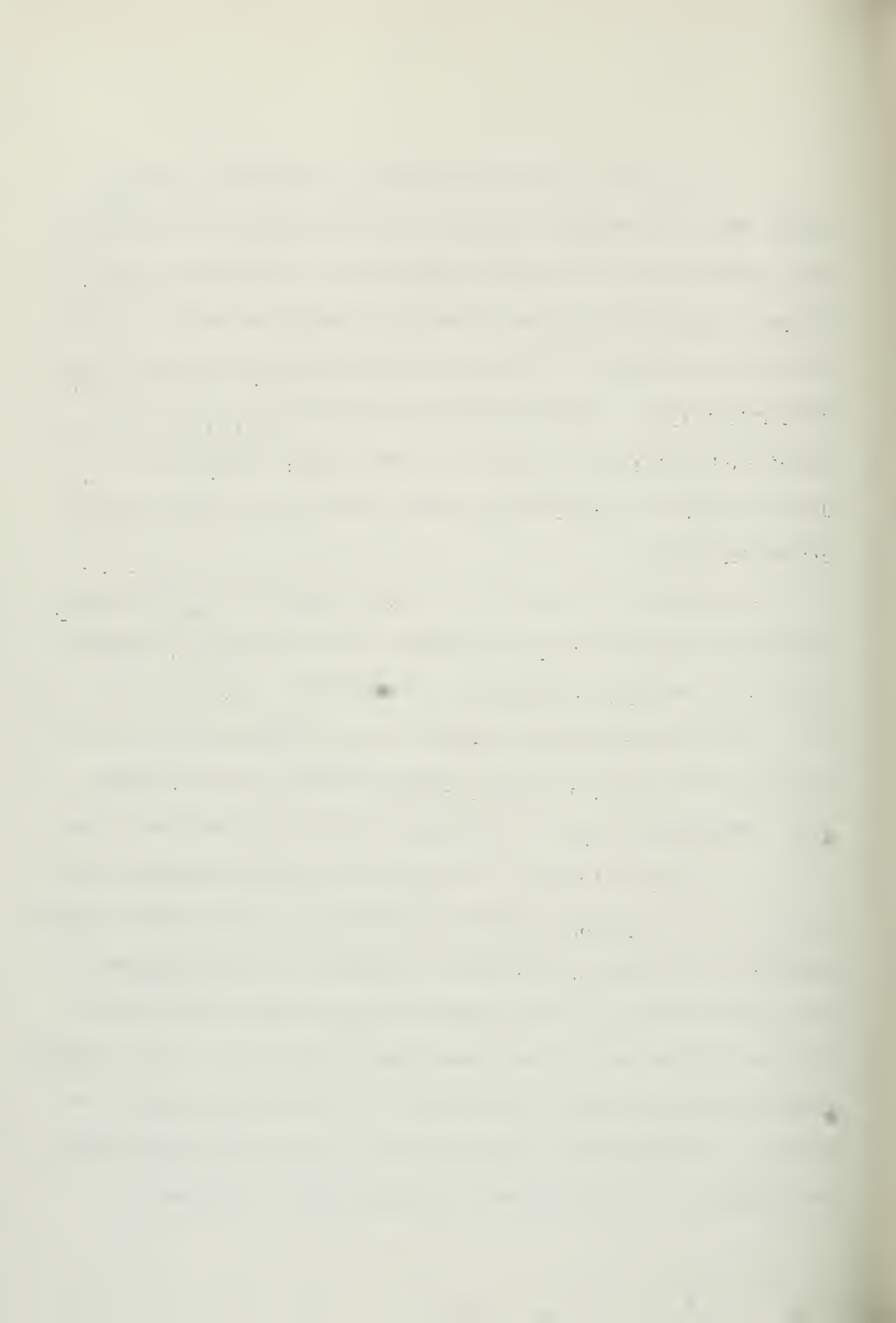
Even if the court did prevent Ponte from testifying as to whether he used the Y & D blueprint in making his inspection, it is hard to see how this was prejudicial to plaintiff. If there was any evidence disclosed by the Y & D blueprint that was admissible, that evidence could have been introduced by plaintiff directly. For example, Ponte could have been asked whether it was not a fact that his inspection revealed that the facility had been constructed differently from what was shown in the Y & D blueprint. However, no such attempt was made.



The offer of proof made by plaintiff at this point was, of course, related to the question of whether the installation had been defectively constructed which claim, as heretofore indicated, had been abandoned by the plaintiff, so that the trial court naturally rejected the offer of proof. Plaintiff does not in his brief claim that the court erred in this respect and, therefore, it is not clear why plaintiff brings this up at this portion of his argument.

During the course of his argument on this point plaintiff also refers to certain questions put to Hawaiian Electric's witness Zeigler by plaintiff's counsel (O.B. 17). However, plaintiff points to no ruling made by the court in the course of this examination of which plaintiff complains or as to which plaintiff now assigns error.

Plaintiff also on page 68 of this section of his brief discusses certain testimony of plaintiff's expert called on rebuttal. Plaintiff claims that this witness testified "that if the transformer had been rotated 180 degrees, there would have been less chance of current entering the guy wire (Tr. 1334-1337)". This would seem to relate to the abandoned claim of defective construction and, therefore, to be irrelevant to plaintiff's argument.



However, even if it were relevant, it does not appear that this witness testified as stated by plaintiff. The witness was asked whether the position of the transformer had any bearing on how the current got into the guy wire. His testimony in this respect was as follows:

"Q Now, Mr. Crawley, I want you to assume that electrical power entered this guy wire somewhere on the guy wire, and that it descended to the ground. Does the position of this transformer in this installation have any bearing on how the current got into that guy wire?

"MR. O'CONNOR: I object to the form of the question, your Honor. I further object in that this is not proper rebuttal. It has nothing to do with any issue in this case.

"THE COURT: Overruled.

"Q (By Mr. Ryan) Did you follow the question?

"A Yes, I did. Yes, it would have a bearing on voltage entering the guy, or coming into contact with the guy.

"Q Why would the position of the transformer, as it appears in this installation, have had a bearing on how the current entered the guy wire, assuming that the current entered the guy wire?

"MR. O'CONNOR: Same objection as previously made, your Honor, to the form of the question.

"THE COURT: Same ruling.



"A I think it's obvious that there are two insulators on one side of the transformer, and there's only one on the other side.

"Q (By Mr. Ryan) All right. You're talking about these two? (Indicating)

"A Yes.

"Q And you're talking about this one in the back?

"A Yes.

"Q These are the uprights on top of the transformers?

"A Yes. With the two insulators as they're placed in the position that they are in now --

"MR. STIFEL: Excuse me, your Honor We object to this on the ground that it's irrelevant to any issues in this case. There is no claim being made that this insulator -- that this transformer was installed improperly. Now, if the witness is called to testify how the current actually got to the guy wire, that's one thing. But if he's called for any other purpose, we respectfully submit that his testimony is irrelevant.

"THE COURT: Overruled.

"A (Continuing) The two insulators on the side, in the closeness to you there in the photograph, the relative position is closer to the guy wire in this position than if the transformer would be, let's say, rotated in the opposite direction 180 degrees.



"MR. STIFEL: Excuse me, your Honor. Now we object to that answer and move that it be stricken. This matter has expressly been presented to your Honor by Mr. Ryan in his offer of proof and rejected. We ask that the answer be stricken and the jury instructed to disregard it. The witness has just speculated as to what might have been the situation had the transformer been installed in some other way.

"MR. O'CONNOR: We join in the objection and the request to strike.

"MR. HAYASHI: And the Government.

"THE COURT: Overruled.

"Q (By Mr. Ryan) Did I understand you correctly to say that if the transformer had been turned around, then these wires --

"MR. HAYASHI: That was not the testimony, your Honor.

"Q (By Mr. Ryan) Would you explain what you said?

"A Yes. I'm saying that the insulators, in the position that they are in now, place themselves in a closer proximity to the guy wire if they were 180 degrees in the other direction -- if the transformer was rotated by 180 degrees."  
(Tr. 1334-1337)

It is to be noted that the witness did not say

"that there would have been less chance of current entering the guy wire" if the transformer was rotated 180 degrees,



but merely that "the insulators" were closer to the guy wire than if rotated 180 degrees. Furthermore, this witness did not say that any energized wires at the installation were dangerously close to any guy wire or that the installation as it existed at the time of the accident was in any way defective or unsafe. Therefore, even if this witness' testimony had been properly admissible, it is submitted that it would have been of no help to plaintiff.

At this point in his brief plaintiff on page 68 says, "it was at this juncture that counsel for the plaintiff moved to amend the pretrial order to have it conform with the pleadings and the proof which was denied (Tr. 1366, 1385-1386)". What plaintiff means by "this juncture" does not appear. Plaintiff did not make any motion to conform the pleadings to the proof during the course of this witness' testimony nor immediately thereafter. Instead, plaintiff called the plaintiff as a rebuttal witness and at the conclusion of his testimony all parties rested.

Although plaintiff's mention of a motion to conform the pleadings to the proof at this point in his brief when he is discussing the installation of the transformer would seem to indicate that the proof referred to had something to do with the installation of the transformer, no such motion can be found anywhere in the transcript.



If one refers to the pages cited by plaintiff, that is, 1366 and 1385-1386, one finds that during the course of argument on the defendants' motions for directed verdicts, plaintiff's counsel after stating that the United States and Hawaiian Electric jointly maintained the Kunia facility, said, "and if there is any need for a motion, why, I would ask the court to amend this to conform with the proof in the case." If this was actually a motion, the court did not recognize it as such for when Mr. Ryan referred to his motion later in the day, the court said that the court had not heard it (Tr. 1385-1386). In any event, it is obvious that if this was a motion, it did not have anything to do with the installation of the transformer or the position of the transformer or any claim of alleged defective construction or with the Y & D blueprint. Therefore, this motion seems to have no relevance to this section of plaintiff's brief.

On page 69 of his brief plaintiff states that, "the denial to the plaintiff of the right to show by cross examination that the installation was not safe prejudiced his case." Plaintiff does not say what he means by this, nor does he point to any place in the transcript where he was denied the right to cross examine any witness.



Therefore, it must be assumed that he is still discussing the Ponte cross examination which, as indicated above, does not bear out the plaintiff's claim.

On page 70 of his brief plaintiff states, "we are closely approaching the area of a party's falsehood or other fraud in the preparation or presentation of his case (the effort undertaken by the government to show an 'absolutely safe' guy wire), and in such an instance the contrary may always be shown by independent proof." Plaintiff does not bother to point out what effort by the government he is talking about or why it approaches "falsehood or other fraud". Therefore, there seems to be no point in attempting to answer the charge.

In view of the foregoing, it is submitted that there is no basis for reversing the judgments below, either because of the denial of plaintiff's motion to inspect and photograph the premises or because of any alleged restriction of cross examination of the government's witness in respect to the difference between the Y & D blueprint and the condition of the Kunia facility at the time of the accident.

4. Plaintiff's argument relative to  
res ipsa loquitor

On pages 72 through 75 of his brief plaintiff



argues in respect to the doctrine of res ipsa loquitor. Plaintiff acknowledges that this doctrine was not an issue in the case as late as January 17, 1967, which was during the course of the trial. At no point thereafter until after the conclusion of the trial did the plaintiff ever claim any right to rely upon this doctrine. Now, however, plaintiff claims that he should have been given the benefit of this doctrine by virtue of his motion to amend the pretrial order to conform with the proof citing pages 1366, 1385 and 1386 of the transcript. However, the only matter covered by the motion, if it be considered a motion, was the claim that Hawaiian Electric and the United States jointly maintained the facility. How this motion could bring the doctrine of res ipsa loquitor into the case the plaintiff does not explain and it is submitted that there is no basis for the court to consider this doctrine.

Even if the doctrine could be considered, it would have no application to Hawaiian Electric, since there is no evidence that Hawaiian Electric owned, maintained or controlled the premises or the guy wire or any energized electrical wire with which the guy wire could have come into contact.



C. Answer to plaintiff's argument relative to his motion for judgment notwithstanding the verdict or for a new trial

1. Plaintiff's argument relative to a new trial

Plaintiff sets forth four grounds upon which he claims he is entitled to a new trial. These will be considered separately in the order presented.

a. Argument based on alleged misconduct of counsel

Plaintiff not being able to conceive of how the attorney for defendant Okano became acquainted with the contents of the records of the Veterans Administration before those records were actually admitted into evidence has concluded that, therefore, the evidence was "tainted" so that its use demands a new trial.

A representative of the Veterans Administration had been subpoenaed to appear in court on the first day of trial with Mr. Poston's records. These records had been brought to court on the first day of trial and, thus, became available to all parties. Plaintiff has pointed to no impropriety on the part of any counsel for any defendant in this respect and has cited no authority in support of his contention and it is submitted that there is none.



Plaintiff next claims that counsel for Okano was guilty of misconduct in stating in his opening statement that the Okano superintendent would testify that he had not told the plaintiff to remove the guy wire and that the facts would show that plaintiff removed the guy wire from the anchor and looped it over the fence.

An examination of the transcript indicates that the Okano superintendent Teves testified exactly as counsel said he would:

"Q (By Mr. O'Connor) Did you tell Poston that he could take out the guy wire?

"A No." (Tr. 662).

As to the statement that the facts would show that plaintiff took the guy wire from the anchor and looped it over the fence the evidence clearly establishes this to have been the fact.

The plaintiff himself testified that the guy wire blocked the excavation work he was doing and that after asking the Okano foreman about removing it he removed two of the three bolts in the clasp plate that held the guy wire in place (Tr. 188-199). The government's witness Ponte testified that shortly after the accident



the clasp plate was found with the third bolt loosened (Tr. 1100) and that the guy wire was found hanging over the corner of the fence that enclosed the pole to which the upper end of the guy wire was attached (Tr. 1096) as shown in exhibit G-5 (Tr. 1097) at a point about fifteen feet from the anchor to which it had been attached (Tr. 1106-1107). He also testified that he saw a burned spot on the upper part of the guy wire and a corresponding spot on one of the lines coming down from the main transmission line and also a burned spot on the bottom of the fence and a burned spot of grass at the corner of the fence (Tr. 1036-1038). The government's witness Howard James Landry testified that within about five minutes after the Hawaiian Electric current coming to the Kunia facility was shut off he arrived at the scene of the accident and saw the guy wire hanging over the corner of the fence (Tr. 1029 and 1032-1033). The government's witness Lt. Thomas H. Emsley USN testified that he was in Room V-213 in the Kunia facility, that there was a power failure, that he immediately went to the switchboard and then to the intake tunnel and then to the scene of the accident where he noticed that the detached guy wire had been laid over the top of the fence at the corner as shown in

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exhibit G-5 (Tr. 1069-1071). Mr. Emsley also testified that there were no burn marks on the anchor (Tr. 1076) and that there were burn marks on the guy wire just under the insulator and on the left phase of the overhead line and on the case and on the corner post of the fence and on the guy wire where it was hanging over the fence and that there was a charred area on the ground next to the corner post of the fence that seemed to still be smoking when he arrived at the scene (Tr. 1074).

Plaintiff also points to the fact that in his opening statement Okano's attorney said that the plaintiff took the clamp and bolts off the guy wire and placed them by the fence whereas the testimony later showed that the clamp and bolts were found beside the anchor. This minor discrepancy could not be characterized as misconduct and certainly would not warrant a new trial.

In respect to the claim that the government's attorney cited a Hawaii case that had been reversed, plaintiff's counsel fails to identify the memorandum in which this alleged misconduct occurred. At most counsel made a mistake which did not prejudice the plaintiff and could not warrant a new trial.



b. Argument relative to  
plaintiff's deposition

The offer by one party of a portion of a deposition does not automatically make the entire deposition admissible at the request of other parties. It is true that the use of a portion of the plaintiff's deposition by the defendants gave the plaintiff the right to have introduced into evidence all other parts relevant to the part introduced. Here plaintiff has failed to specify what portions of his deposition he claims are relevant to the portions introduced by the defendant and, therefore, his argument for a new trial on this ground cannot be considered further.

c. Argument that the court considered  
workmen's compensation

Plaintiff's expression of sympathy for the plaintiff was only natural as was his supposition that in all probability there was workmen's compensation payable that would cover plaintiff's medical expenses and disability. These expressions certainly do not tend to indicate in the slightest degree that these considerations played any part in the court's determination of the case and furnish no basis for a reversal of the judgments below.



d.     Argument based upon the fifth and  
seventh amendments to the United  
States Constitution

The right to trial by jury has always been subject to the right and obligation of the trial judge to direct a verdict where all reasonable men would agree as to how the case should be decided. The preceding sections of this brief have been devoted to showing that the trial court's actions in granting the directed verdicts were in accordance with this rule and, therefore, they should not be reversed.

2.     Plaintiff's argument that plaintiff  
was entitled to a directed verdict  
against Hawaiian Electric

For the reasons hereinbefore set forth plaintiff was not entitled to a directed verdict against Hawaiian Electric because there was no evidence that Hawaiian Electric was guilty of any negligence which in any way caused or contributed to plaintiff's injuries.

CONCLUSION

Plaintiff has failed to show any reason why



the judgment for Hawaiian Electric should be reversed.

It is submitted that the judgment should be affirmed.

DATED: Honolulu, Hawaii, December 28, 1967.

Respectfully submitted,

A handwritten signature in cursive script, reading "Richard E. Stifel". The signature is written in dark ink and is positioned above a horizontal line.

RICHARD E. STIFEL  
Bank of Hawaii Building  
Honolulu, Hawaii

Attorney for Defendant-  
Appellant Hawaiian Electric  
Company, Inc.



NO. 22051

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

TERRANCE I. POSTON, a citizen  
of Alaska,

Appellant,

vs.

THE UNITED STATES OF AMERICA,  
et al.,


Appellees.

ON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE DISTRICT  
OF HAWAII IN CIVIL  
NO. 2345

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED: Honolulu, Hawaii, December 28, 1967.

  
RICHARD E. STIFEL  
Bank of Hawaii Building  
Honolulu, Hawaii

Attorney for Appellee  
Hawaiian Electric  
Company, Inc.

